Supreme Court, U. S.
FILED
DEC 19 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1977

No. 77-883

MICHAEL DAPPOLONIA,

Appellant,

vs.

BOARD OF CHIROPRACTIC EXAMINERS
OF THE STATE OF FLORIDA

Appellees.

APPEAL FROM THE FOURTH DISTRICT
COURT OF APPEAL OF THE STATE
OF FLORIDA

JURISDICTIONAL STATEMENT

J. MICHAEL CARTER
P.O. 566
Crawfordville, Fl. 32327
Counsel of Record for Appellant

INDEX

	PAGE
OPINION BELOW	2
GROUNDS OF JURISDICTION	2
QUESTION PRESENTED	4
STATEMENT OF CASE	4
SUBSTANTIALITY OF FEDERAL QUESTION	6
CONCLUSION	11
APPENDICES	14
A. FINAL ORDER OF THE BOARD OF CHIROPRACTIC EXAMINERS OF THE STATE OF FLORIDA	14
B. PROPOSED RECOMMENDED ORDER TO THE HEARING OFFICER FOR THE BOARD OF CHIROPRACTIC EXAMINERS OF THE STATE OF FLORIDA	24
C. DECISION OF THE FOURTH DISTRICT COURT OF APPEAL STATE OF FLORIDA	34
D. DECISION OF THE FLORIDA SUPREME COURT	35
E. NOTICE OF APPEAL TO SUPREME COURT OF UNITED STATES	36

INDEX OF AUTHORITIES

CASE	PAGE
American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900)	3
Arnett v. Kennedy, 416 U.S. 134 (1974)	8
Buchman v. State Board of Accountancy, 300 So.2d 671 (1974)	9
Curran v. Laird, 420 F.2d 122 (1969)	7
F. T. C. v. Crowther, 430 F.2d 510 (1970)	8
Grand River Dam Authority v. Grando Hydro, 335 U.S. 359 (1968)	11
Goss v. Lopez, 93 S.Ct. 729 (1975)	8
Herb v. Pet[illegible]airn, 324 U.S. 117 (1945)	11
Hughes Air Corporation v. C.A.B., 482 F.2d 143 (1973)	8
Fox River Paper Co. v. Railroad Commission, 274 U.S. 651 (1927)	9
Martin v. Hunter's Lessee, 1 Wheaton 304 (1813)	10
Smith v. Department of Regulation and Education, 106 N.E.2d 722 (1952)	9
Smith and Soloman Trucking Co. v. U.S., 255 F. Supp 243 (1966)	8

CASE	PAGE
Williams v. Kaiser, 323 U.S. 741 (1945)	10
STATUTES	
Title 28, United States Code, Section 1257(2)	36
Chapter 460, Florida Statutes, Section 460.24	6
OTHER AUTHORITIES	
88 Harvard L. Rev. 1667	8
Amendment XIV, United States Constitution	4
Rule 13(2) of The Supreme Court of the United States	1
Rule 15 of The Supreme Court of the United States	1

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1977

No.

MICHAEL DAPPOLONIA,

Appellant,

vs.

BOARD OF CHIROPRACTIC EXAMINERS
OF THE STATE OF FLORIDA

Appellees.

JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of The Supreme Court of the United States, appellant, Michael Dappolonia, files this Statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the decision entered by the Fourth District Court of Appeal of the State of Florida in this case and should exercise such jurisdiction herein.

OPINIONS BELOW

The decision of the Fourth District Court of Appeal of the State of Florida appears in 346 So.2d 656 and is included herein as Appendix C, pp 34. This decision was a per curiam denial without a written opinion, denying Appellant's Writ of Certiorari which sought to quash the Final Order of the Board of Chiropractic Examiners of the State of Florida revoking Dr. Michael Dappolonia's Chiropractors license. The Final Order is included herein as Appendix A, pp 14. The Recommended Order proposed to the Hearing Officer for the Board of Chiropractic Examiners by Dr. Michael Dappolonia is included herein as Appendix B, pp. 23.

The decision of the Florida Supreme Court appears in So.2d and is included herein as Appendix D, pp. 35. This decision was also a per curiam denial without written opinion, denying Appellant's Writ of Certiorari.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action to revoke Dr. Michael Dappolonia's license No.865 to practice Chiropractic Medicine in the State of Florida. On September 2, 1975, the Board of Chiropractic Examiners of the State of Florida filed an Administrative Complaint against Dr. Dappolonia and a formal hearing was held on January 26, 1976 before a Hearing Officer assigned by the Division of Administrative Hearings of the Department of Administration of the State of Florida. On February 16, 1976, Dr. Michael Dappolonia, through counsel, filed a Proposed Recommended Order. The Hearing Officer issued a Recommended Order on April 16, 1976, which recommended that

Dr. Dappolonia's license be revoked. On Thursday, July 15, 1976, the Board of Chiropractic Examiners of the State of Florida met in official session and voted to adopt the Recommended Order of the Hearing Officer as its Final Order and revoked Dr. Michael Dappolonia's license to practice the profession of Chiropractic in the State of Florida.

On August 16, 1976, Dr. Dappolonia filed with the Fourth District Court of Appeal of the State of Florida a Petition for Writ of Certiorari to the Board of Chiropractic Examiners requesting that the Court grant the Writ and enter an order quashing the Final Order of the Board. The District Court rendered a per curiam decision denying the Petition for Writ of Certiorari on April 7, 1977, and on May 22, 1977, denied a Petition of Rehearing.

On June 9, 1977. Dr. Michael Dappolonia filed with the Florida Supreme Court a Petition for Writ of Certiorari to the Fourth District Court of Appeal of the State of Florida which was denied September 23, 1977. A timely Notice of Appeal was filed October 21, 1977, in the United States Supreme Court. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257 (2)

Cases that sustain the jurisdiction of this Court include;

American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900)
Arrowsmith v. Harmoning, 118 U.S. 194 (1885)
Compare Stadelman v. Miner, 246 U.S. 544 (1918)
Curran v. Laird, 420 F.2d 122 (1969)
Fiske v. Kansas, 274 U.S. 380 (1927)
Fox River Paper Co. v. Railroad Commission, 274 U.S. 651 (1927)
Grand River Dam Authority v. Grand-Hydro, 335 U.S. 356 (1948)
Honeyman v. Hanan, 300 U.S. 14 (1937)
Hughes Air Corporation v. C.A.B., 482 F.2d 143 (9th Cir. 1973)

Lorell v. Griffen, 303 U.S. 444 (1938)
Martin v. Hunter's Lessee, 1 Wheaton 304 (1813)
Overton Park Inc. v. Volpe, 401 U.S. 402 (1971)

QUESTION PRESENTED

Whether Dr. Michael Dappolonia was deprived of his Chiropractor's license without due process and equal protection of the law guaranteed by the 14th Amendment to the United State Constitution.

STATEMENT OF THE CASE

The facts of the case underlying the appeal are as follows: Dr. Michael Dappolonia was licensed both as a Chiropractor, license no. 865, and as a Naturopath, license no. 548. During 1975, Dr. Dappolonia treated Suzzanne Carter for fainting spells using a diagnostic instrument known as a biometer.

On September 2, 1975, the Board of Chiropactic Examiners filed an administrative complaint charging Dr. Dappolonia with treating a patient by the use of a diagnostic instrument not taught in the regular course of instruction in a college recognized by the Board of Chiropractic Examiners, and with prescribing medication consisting of celoids, both acts constituting fraud and deception in the practice of Chiropractic.

On January 26, 1976, a formal hearing was conducted by a Hearing Officer assigned by the Florida Division of Administrative Hearings. After the hearing, Dr. Dappolonia's attorney filed a Recommended Order (Appendix B).

On April 16, 1976, the Hearing Officer issued a Recommended Order deciding that Dr. Dappolonia was not guilty of prescribing medication as a Naturopath; but as a Chiropractor was guilty of using a diagnostic instrument not taught in regular course of instruction in a college recognized by the Board of Chiropractic Examiners, and recommended that his Chiropractor's license be revoked.

On Thursday, July 15, 1976 at Orlando City Hall, 400 South Orange Avenue, Orlando, Florida, the Board of Chiropractic Examiners met in official session to take action on the Hearing Officer's Recommended Order. The Board failed to provide Dr. Dappolonia or his attorney with any notice of this meeting and by luck his attorney learned of this meeting on the day it was being held by way of a local newspaper article. Dr. Dappolonia's attorney got a court reporter and went to the meeting, but before allowing his attorney to address the Board at the meeting, the Board voted to not delay the proceedings so as to allow counsel an opportunity to prepare and appear before the Board concerning the action on the Recommended Order. Only after this vote was taken, was counsel permitted to formally request that the proceedings be continued until the next regularly scheduled meeting, at which time counsel would be prepared to present oral arguments to the Board concerning the Board's action on the Recommended Order. The Board denied Dr. Dappolonia's attorney's request and voted to adopt the Recommended Order of the Hearing Officer.

Dr. Dappolonia petitioned the Fourth District Court of Appeal for a Writ of Certiorari to quash the Final Order adopted by the Board stating on page 6 of his petition that "The Order of the Respondent Board revoking the Petitioner's license to practice the profession of Chiropractic in the State of Florida departed from the essential requirements of law", and listed among those departures that," They did not allow Petitioner's legal counsel to present oral arguments" and that "There are no findings of fact that the Petitioner was acting as a chiropractor when using the diagnostic instrument". After being denied the requested Writ in the Fourth

District Court of Appeals, Dr. Dappolonia appealed to the Florida Supreme Court on a Petiton for Writ of Certiorari to review the denial by the Fourth District Court of Appeal and he attached his earlier Petition for Writ of Certiorari to the Board, which brought the aforementioned departures from the essential requirements of law before the Florida Supreme Court. The Florida Supreme Court denied certiorari; in the same manner as the Fourth District Court of Appeal , a per curiam decision without a written opinion.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial federal questions, as hereinafter described, in that, the Hearing Officer's decision adopted by the Board was arbitrary and capricious in finding that Dr. Dappolonia was a Chiropractor when using the diagnostic instrument and not a Chiropractor when prescribing medication; when in fact, both acts are legal as a licensed Naturopath under Florida Statutes, Chapter 460 which pertains to Chiropractors, in particular Section 460.24 which reads as follows:

> "460.24 CHAPTER NOT APPLICABLE TO OTHER HEALING PRACTICES. --nothing in this chapter shall be construed to apply to or in any manner interfere with any other method or science of healing in this state, the person practicing such other method or science of healing having been heretofore licensed to do practice under any law of this state."

This arbitrary and capricious finding that Dr. Dappolonia was a Chiropractor in one instance and a Naturopath in another when the alleged fraudulent acts occurred simultaneously was a denial of equal protection under the law; and if left unrectified, would mean

that every Florida citizen holding dual licenses, one of which was Chiropractic, could lose his Chiropractor s license by doing acts totally lawful and within his other licensed profession. The Hearing Officer decided that prescribing medication, which is outside Chiropractic, was lawful, but that using a biometer which is outside Chiropractic was not - a more arbitrary and capricious finding without any logic could scarcely be imagined.

Nothing in Florida law mandates that a citizen holding dual licenses must inform the patient that, "now I'm acting in this capacity and now I'm acting in my other discipline". It is ludicrious to think the law would demand such disclosure where the law provides for dual licensing, but that is specifically what the Hearing Officer's Recommended Order adopted by the Board would require. For this reason a Substantial Federal Question arises to protect all-dual licensed Florida citizens from such an illogical and arbitrary result.

Further, a Substantial Federal Question arises, in that, the Board adopted the Hearing Officer's Recommended Order without giving notice of the intended action on the order to the party adversely affected; and when luckily learning of the intended action, denying the adversely affected partys' counsel an opportunity to orally argue against the Board's decision of whether to adopt the Recommended Order or not. This was a fundamental denial of due process and raises a Substantial Federal Question.

Analyzing cases which support Appellant's contention of jurisdiction leads foremost to Curran v. Laird, 420 F.2d 122 (1969) where in the court held that there is a "general rule that official administrative action is reviewable in courts when a person claims injury from an act taken by a government official in excess of his powers". The Hearing Officer's powers must and are limited to following the

law which provides that Dr. Dappalonia may do the alleged fraudulent acts as a Naturopath without any requirement that he disclose that he is not acting as a Chiropactor.

The Ninth Circuit Court of Appeals in Hughes Air Corporation v. CAB, 482 F.2d 143 (1973) concerned itself with an adminsitrative action and said, the "Court may set aside administrative agency action which is arbitrary or abuse of discretion if court is of opinion that action was clearly wrong." The Appellant here contends that this is such a case and that the opinions below from the Board's action on the Recommended Order to the Fourth District Court of Appeal to the Florida Supreme Court has been nothing more than a rubber stamp approval of an arbitrary and capricious finding of the Hearing Officer. In Smith and Solomon Trucking Co. v. US, 255 F. Supp 243 the court said the "Court may not give rubber stamp approval to administrative agency's findings that are arbitrary or not supported by substantial evidence." The United States Court of Appeals District of Columbia in F. T. C. v. Crowther, 430 F.2d 510 at 514 said, the "Court must be alert to agency action which is arbitrary or capricious and take note of those situations where it has not adequately explained its departure from prior norms and has not sufficiently spelled out legal basis of its decisions".

Before the Supreme Court takes jurisdiction of a case a property interest must be affected and Dr. Dappolonia's Chiropractor's license is such a property. In 88 Har. L. Rev. 1667 (1975) on page 719-720 in an article entitled "Reformation of Administrative Law" the writer cited the Arnett and Goss cases, respectively Arnett v. Kennedy, 416 U.S. 134 (1974) and Goss v. Lopez, 93 S.CT. (1975) and said that "Arnett and Goss seem to establish that whenever a person is entitled to challenge official conduct as contrary to statute, he is possessed of a constitutionally protected

"property" interest." Certainly a license to a profession is sufficiently imbued with a property interest.

Futhermore under Florida law and elsewhere, the revocation of a person's license to his livelihood demands close scrutiny. In Florida the case of Buchman v. State Board of Accountancy, 300 So3d 671 (1974) held that "Statutes permitting revocation of occupational licenses are penal in nature.", and on page 673 of this same decision followed this statement and citing from another case said "...The rule is that, where Statutes of this kind are invoked, the provisions of the Statutes must be strictly followed, because the Statute, as hereinbefore stated is penal in it nature.". Further on in this decision on page 674, the court reinforced this proposition of law saying, "Earlier we stated that when rights of life, liberty or property are materially affected by the exercise of official administration discretion, due process of law must be offered to the proceedings." Also see Smith v. Department of Registration and Education, 412 III 332, 106 NE2d 722 as typical statements of law in that"so serious a proceeding as to revoke the license of a doctor, due process requires a definite charge, adequate notice, and a full, fair, and impartial hearing."

Jurisdiction cannot be denied because the Chiropractor's license is shrouded in State law. In Fox River Paper Co. v. Railroad Commission, 274 U.S. 651 (1927) the court held that "the jurisdiction of the Supreme Court of the United States is not affected because the existence of the right for which constitutional protection is claimed depends upon state law." Granted Dr. Dappolonia's Chiropractor's license is a privilege under state law, but once the state legislature extends the privilege, which was extended to practice Chiropractic simultaneously with other disciplines, and did not impose disclosures of what discipline of healing was being administered at each

step of the patient's care, a Hearing Officer cannot come along later and arbitrarily decide to impose such limitations. As old as the case of Martin v. Hunter's Lessee, 1 Wheaton 304 (1813), appellate jurisdiction of the Supreme Court has extended to a final judgment in any suit in the highest court of a state wherein is drawn in question the validity of an authority exercised by any state which is alleged as repugnant to the Constitution. The Hearing Officer's actions adopted by the Board and upheld by the Fourth District Court of Appeal and Supreme Court of the State of Florida is such a final suit. The established scope of review has been to limit certiorari to determine whether procedural due process had been accorded the party by the agency, whether the agency charges were supported by substantial competent evidence and whether essential elements of law had been observed by the agency. The charge is of an unconstitutional exercise of authority under a law which is valid.

Jurisdiction to review the decision of the Fourth District Court of Appeal of Florida is explicated in the questions asserted to that court and later presented to the Florida Supreme Court. The decision of these courts while per curiam denials without written opinion still convey jurisdiction because as stated in Williams v. Kaiser, 323 U.S. 471 (1945), "review by the Supreme Court of a judgment of a state court requires that it appear from the record, affirmatively or by fair implication, that a decision as to the federal question was necessary to the state court's determination of the cause.", "A federal question involved in a case in a state court will be deemed to have been passed upon, either necessarily or hypothetically, by the state court where that court's discussion of the question is relevant only upon the assumption that its decision of the question of state law involved in the case was such as to give occasion to consider the federal question,", as stated in Herb v. Peteairn,

324 U.S. 117 (1945) and finally as stated in Grand River Dam Authority v. Grand-Hydro, 335 U.S. 359 (1948) the court said "... the fact that a state court purports to rest its decision on state law does not eliminate the duty of the Supreme Court to consider a federal question, properly raised and presented, which is necessarily, although impliedly, adjudicated by the state court."

CONCLUSION

For the reasons stated above, appellant submits that this appeal brings before the Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Dated December 19, 1977.

Respectfully submitted,

J. Michael Carter
Attorney for Appellant

NOTICE

TO: Robert Shevin, Florida Attorney General and Charles J. Ruberg, Assistant Attorney General

You are hereby notified that on the 19th day of December, 1977, the Appellant, Michael Dappolonia, by and through the undersigned attorney, filed in the Supreme Court of the United States the foregoing Jurisdictional Statement. Three copies of said Jurisdictional Statement are herewith served upon you.
Dated December 19, 1977.

J. Michael Carter
Attorney for Appellant
P.O. Box 566
Crawfordville, Fl. 32327

CERTIFICATE OF SERVICE

I, J. Michael Carter, a member of the Bar of the Supreme Court of the United States, and of counsel for the Appellant herein, hereby certify that I have this day served three (3) printed copies of the foregoing Jurisdictional Statement and appendices thereto on the Appellee herein, by depositing same in a United States Post Office with first class postage prepaid addressed to counsel of record for the Appellee, as follows: Robert Shevin, Florida Attorney General and Charles S. Ruberg, Assistant Attorney General, Department of Legal Affairs, Office of Attorney General, the Capital, Tallahassee, Florida, 32304, this 19th day of December, 1977.

J. Michael Carter

Appendix A

STATE OF FLORIDA, DIVISION OF PROFESSIONS, DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION, BOARD OF CHIROPRACTIC EXAMINERS.

In Re: The revocation or suspension of the license of Michael Dappolonia, D.C., License No. 865

Case No. 75-1642

FINAL ORDER

THIS CAUSE came on to be heard in a formal proceeding pursuant to §120.57(1), F.S., after due notice to the parties at Winter Park, Florida, on January 26, 1976, before K. N. Ayers, Division of Adminsitrative Hearings. By Administrative Complaint the Respondent was charged with treating a patient by the use of a diagnostic instrument not taught in the regular course of instruction in a college recognized by the Board of Chiropractic Examiners, which constitutes fraud and deception in the practice of chiropractic. The Respondent was also charged with prescribing medication consisting of Celoids, which also constituted fraud and deception in the practice of chiropractic.

The Florida State Board of Chiropractic Examiners hereby adopts in toto, the Recommended Order of the hearing officer issued on April 16, 1976, a copy of which is attached as Exhibit A.

THEREFORE, it is hereby ORDERED AND ADJUDGED that the Respondent's license is hereby revoked and his right to practice the profession of Chiropractic in the State of Florida is terminated.

DONE AND ORDERED this 15th day of July,

1976, in Orlando, Florida.

s/ J. K. Hendricks, DC
President,
Florida State Board of
Chiropractic Examiners

s/ Paul Vogel DC
Secretary-Treasurer
Florida State Board of
Chiropractic Examiners

cc: All Parties

I hereby attest that this is a true and correct copy of this order filed this 15th day of July, 1976 with the Secretary of State.

s/ C. A. Hartley
C. A. Hartley, Coordinator
Florida State Board of Chiropractic
Examiners

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

In re: The revocation or suspension of the license of Michael Dappolonia, D.C., License No. 865

CASE NO. 75-1642

Pursuant to notice, the Division of Administrative Hearings, by its duly designated hearing officer, K. N. Ayers, held a public hearing in the above styled cause on January 26, 1976 at Winter Park, Florida.

APPEARANCES:

Ronald LaFace, Esquire, P.O. Box 1752, Tallahassee, Florida 32302, representing the State Board of Chiropractic Examiners

John W. Bowen and Julius G. Petruska, ROWLAND, PETRUSKA, BOWEN, and McDONALD, P.O. Box 305, Orlando, Florida, 32802, representing Michael Dappolonia.

RECOMMENDED ORDER

By Administrative Complaint filed September 2, 1975 the Florida State Board of Chiropractic Examiners seeks to revoke, annul, withdraw, or suspend the license of Michael Dappolonia, D.C., who holds License No. 865, upon the allegations that he treated a patient by use of a diagnostic instrument not taught in the regular course of instruction in a college recognized by the Board of Chiropractic Examiners; that he prescribed medication consisting of Celoids; and that by using the diagnostic instrument, which was incapable of doing what he represented it could do, licensee was guilty of fraud and deception in the practice of chiropractic. Further, it was alleged that in prescribing

the pills the licensee was guilty of fraud and deception. The Board presented 5 witnesses and the licensee three witnesses, including himself and his wife.

FINDINGS OF FACT

Mrs. Carol Ann Carter's daughter, Suzanne, had passed out at school a few times and, when routine medical checks failed to disclose the specific cause, Mrs. Carter thought a pinched nerve might be the problem. She took Suzanne to Dr. Dappolonia, a chiropractor, whose name was suggested by a friend. Medical doctors had indicated more drastic tests would be required to ascertain the cause of the problem and, before embarking on those tests, Mrs. Carter decided to try the services of a chiropractor.

On her first visit Dr. Dappolonia took x-rays of the patient and explained to Mrs. Carter that he could diagnose Suzanne's problems with his biometer machine. Mrs. Carter expressed her skepticism to Dr. Dappolonia when he advised her that the machine could diagnose the condition of all body organs. When she told him she didn't want to be ripped off he assured her that the machine was all he claimed it to be. When Dr. Dappolonia examined Suzanne by use of the biometer he advised her and Mrs. Carter that she had five hundred million units of infection in her nervous system and prescribed pills to be taken at frequent intervals - initially 5 every 15 minutes for one hour then 5 per hour. He further advised that these pills were unique in that if touched by human hands they would be neutralized and would not be effective therafter. When told this Mrs. Carter again expressed her skepticism, but Dr. Dappolonia assured her that the treatment and medication would cure her daughter's malady. During the course of these treatments Dr. Dappolonia told Suzanne and Mrs. Carter that it was necessary to believe in the machine and the pills in order for them to work.

Suzanne received some seven or eight treatments from Dr. Dappolonia which consisted of checks by use of the biometer and continuation of the Celoid pills. On the last visit Mrs. Carter was advised that Suzanne was now suffering from insecticide poisoning and that a different Celoid pill would be needed. He prescribed for her some of these pills.

Mrs. Carter took these pills to her family doctor, Dr. Miller, who sent them to a laboratory for analysis. The pills contained none of the ingredients normally found in medcines and were physically similar to certain sugar pills carried in pharmacies for use as placebos. Chemical tests conducted showed the pills consisted principally of dissacherides, either lactose or maltose, and contained no ingredient normally used to combat insecticide poisoning. Dr. Miller was advised of the results of the laboratory tests.

During the various visits Suzanne made to Dr. Dappolonia the biometer was used on each visit. Suzanne and Mrs. Carter described the machine as having the outward appearance of an old radio with several knobs which could be turned but no meters or recording devices which had needle or stylus that moved. A black 4" x 4" x 1/3" black plate with two wires attached would be placed on the body and Dr. Dappolonia, with his fingers on the plate, would turn dials on the machine and thereafter announce the amount of infection in the organ.

Dr. Gary Miller has treated Suzanne Carter off and on since 1973 as the family doctor. In January, 1975 she was examined by him following a syncopal episode (fainting). This examination revealed no physical adnormality that would account for the episode. She was advised to keep a running record of these episodes if they occurred.

Dr. Miller saw Suzanne in February, 1975 with no reported recurrence of syncopal episodes. He saw her again in May, 1975 when

several intervening episodes were reported. At this time he conducted an electroencephalogram which was normal. Suzanne was next seen on June 3, 1975 for pain in her right elbow which had been bruised in a fall. At this time Mrs. Carter asked him to have pills analyzed and to check Suzanne for insecticide poisoning. He saw no symptoms of such poisoning and suspected that the pills were placebos. When he received the report from the laboratory that the pills were composed of dissacherides he considered his suspicisions confirmed. In any event the pills would have had no therapeutic value in treating insecticide poisoning.

Dr. Miller has had special training in several fields of medicine including internal medicine, is unaware of any machine that can measure infection, and he has never heard of a machine as described by Suzanne and her mother used in any field of medicine.

Homer S. Stallings, D. C. is a licensed chiropractor and former member of the Board of Chiropractic Examiners. As such he is generally familiar with the curriculum and the schools that are approved by the Florida Board of Chiropractic Examiners that will qualify a graduate to be admitted to practice in Florida. He is aware of none that teach the use of any particular instrument to diagnose infections. Chiropractors cannot prescribe medications; however, naturopaths are permitted to do so.

At the completion of the Board's case Respondent's motion for directed verdict on grounds that evidence failed to show the treatment given by licensee was done in chiropractic practice and to strike all testimony respecting the biometer, was denied.

Exhibit 1, a photocopy of Dr. Dappolonia's license as a naturopathic physician was admitted into evidence without objection.

J. L Alexander, D.C., N.D. has been a licensed naturopath in Florida since 1950 and a licensed chiropractor since 1952. He did not renew his chiropractic license in 1975 and is now practicing only naturopathy. He operated a diagnostic machine similar to the one used by Dr. Dappolonia in Kentucky before he came to Florida in 1950. He knows the instrument as as a radioclast or hemoclast and used a radioclast in giving phsiotherapy in Kentuky. Dr. Alexander described the radioclast as an electrical instrument used to measure vitality by picking up vibrations from vibrations from vorious organs. He used placebos but only to test the truth of a patient's systoms. Dr. Alexander is aware of no school that teaches the use of the radioclast.

Mrs. Dappolonia presented receipts of payments made by Mrs. Carter as Composite Exhibit 3. On the top thereof appears (less address) NA PIER CLINIC
CHIROPRACTIC AND MEDICAL NATUROPATHY

A photograph of the front of Dr. Dappolonias office was admitted into evidence as Exhibit 2. Thereon, following the name M. Dappolonia, appears D.C., N.D.

Dr. Dappolonia is licensed in Florida as a chiropractor and naturopath. He considered his presecription of pills for Suzanne Carter to be authorized under his license as a naturopath and his use of the diagnostic machine to be authorized under the same disipline. He treats no patients solely as a chiropractor and considers the form completed by his patients on their first visit, which nowhere thereon refers to specific treatment, to authorize him to treat these patients either as a naturophatic physician or as a chiropractor as he sees fit. The only time he advisees patients he is operating under his naturopathic license is when he writes a prescription. He considers it diff-

icult to draw the line between chiropractic and naturopathic practices except when drugs are dispensed which is always as a naturopath.

He described the pills given to Suzanne as Celoid Salts. One contained sodium sulfate in a vehicle of milk sugar. Others he prescribed for Suzanne contained different salts in a malt sugar vehicle. For the insecticide poisoning the pill was an I-Celoid which contained a mixture of three individual cell salts containing magnesium, sulfur and iron. These pills were not given as placebos, but to reduce the systemic virus and insecticide poisoning diagnosed by use of the biometer. He stressed to Suzanne the necessity for her to believe in the treatment he prescribed in order for it to work.

Dr. Dappolonia identified the instrument he used to diagnose Suzanne's illness as a biometer. He first became interested in"radionics" while a student at the National College in Chicago from which he received degrees in chiropractic and naturopathic. He took post-graduate work at a private school conducted by a Dr. Spitler, N.D. at Eton, Pennsylvania. The institution was a combination of clinic and school with only one instructor.

According to Dr. Dappolonia it is absolutely necessary to have a background in electronics in order to understand the operation of the biometer. The biometer measures the body's resistance, but Dr. Dappolonia was unable to explain whether the resistance was to electrical current or to frequency or how such resistance was electronically measured. According to him all organs and glands give off fixed frequencies. As he explained the theory of the biometer it appears that every heart has a vibrating frequency that is the same regardless of the variations in age, condition, etc. of the patient. When an organ or gland is being tested the machine is set for the frequency applicable to that gland or organ and by finger touch on the black 4" x

4" x 1/3" sensor placed on the body the dial is adjusted so the vibrations are damped out. Any movement of the dials from the standard setting that are necessary to damp out the vibrations represent abnormalities in the organ or gland being tested. In this manner he diagnosed Suzanne Carter initially having 25 million units of infection and subsequently he diagnosed insecticide poisoning.

When asked to draw a schematic diagram showing how the machine converted electrical energy into whatever impulses were transmitted through the 4" x 4" x 1/3" sensor Dr. Dappolonia drew what appeared to be the location of the knobs on the face of the instrument. This drawing is attached to the record as an unmarked exhibit. Its admission was objected to by Dr. Dappolonia and it was never accepted into evidence although no ruling was made on the objection at the hearing. This exhibit is now admitted as evidence of Dr. Dappolonia's understanding of electronics.

CONCLUSIONS OF LAW

From the foregoing it is concluded that Michael Dappolonia, D.C.,N.D. used deceit, deception and fraud in the diagnosis and treatment of Suzanne Carter in May and June of 1975. He held himself out as a chiropractor and Mrs. Carter took her daughter to him for chiropractic treatment. The diagnosis made on Suzanne Carter was made by use of an instrument nottaught at a college approved by the Florida State Board of Chiropractic Examiners and the biometer used is incapable of performing the functions tauted by Dr. Dappolonia. Such conduct constitutes a violation of § 460.13(3)(h) and (n) F.S.

Dr. Doppolonia's contention that prescribing medication he was acting as a naturopathic physician has merit as there was no dispute that he identified himself as a naturopath while prescribing medication or drugs. It is therefore concluded that Dr. Michael

Dappolonia, D.C.,N.D. is not guilty of Charge 2 of the Administrative Complaint.

His contention that his use of the biometer was done only under the naturopathic discipline is inconsistent with his testimony that the only real distinction in the practice of the two disciplines is in the prescribing of medication; and with his testimony that, regardless for what purpose patients appeared, he treated them using whichever discipline he considered appropriate for his diagnosis. A practitioner who labels himself a chiropractor, holds himself out as a chiropractor to the general public, receives patients who come to him for chiropractic treatment, and does not disclose he is treating his patients with another discipline must be presumed to be a chiropractor and operating under the chiropractic discipline while treating patients so received.

Dr. Dappolonia is a charlatan. He cannot obtain patients by virtue of his license to practice chiropractic and then ignore the disciplines of the profession without violating the provisions of Chapter 460 F.S. When he so uses his license such conduct is most reprehensible and the perpetrator should be permanently curtailed. It is therefore,

RECOMMENDED that the Chiropractic License No. 865 issued to Michael Dappolonia, D.C.,N.D. be revoked.

DONE nad ENTERED the 16th day of April, 1976, in Tallahassee, Florida.

s/ K. N. Ayers
K.N. AYERS
Hearing Officer
Division of Administrative Hearings
Room 530, Carlton Building
Tallahassee, Florida 32301

Appendix B

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

In re: The revocation or suspension of the license of MICHAEL DAPPOLONIA, D. C., License No. 865

DOCKET NO. 75-1642

RECOMMENDED ORDER

A public hearing was held in the above-captioned case, after due notice to the parties, at Winter Park, Florida on Monday, January 26, 1976.

APPEARANCES

RONALD LaFACE, ESQUIRE
P.O. Box 1752
Tallahassee, Florida 32302

For the State Board of
Chiropractic Examiners

JOHN W. BOWEN, ESQUIRE
P.O. Box 305
Orlando, Florida 32802

For Michael Dappolonia

ISSUES PRESENTED

Whehter or not licensee engaged in unauthorized practices in using a diagnostic instrument, the use of which is not taught in the regular course of instruction in a college recognized by the Florida State Board of Chiropractic Examiners in violation of Rule 21D-1.01 FAC and whether or not Michael Dappolonia was guilty of violating Florida Statutes Section 460.13 (3) (f),

(h), or (m) in the treatment of Suzzanne Carter in May and June of 1975.

The administrative complaint filed in this action by the Florida State Board of Chiropractic Examiners accused the licensee of treating one Suzzanne Carter between May of 1975 to June, 1975. In the course of his treatment the licensee is accused of using a diagnostic instrument, the use of which is not taught in the regular course of instruction in a college recognized by they Florida State Board of Chiropractic Examiners.

Additionally the licensee in his treatment of Suzzanne Carter is accused of prescribing medication in the form of some pills which were given to aid in the reduction of infection and elimination of the headache of which Suzzanne Carter was complaining. It is alleged that such pills were composed of a Disaccharide or sugar and therfore they could not reasonably be expected to produce the results as indicated. It is alleged that the prescribing of such medication was done by the licensee in his capacity as a licensed chiropractor.

Finally it is alleged that the licensee in using a diagnostic instrument made claims concerning the capabilities of such diagnostic instrument when the licensee knew or should have known that the instrument was incapable of performing as claimed. It is alleged that such claims were made by the licensee in his capacity as a licensed chiropractor.

FINDINGS OF FACT

1. Michael Dappolonia is and was at all times pertinent to this action a Chiropractor licensed by the Florida State Board of Chiropractic Examiners and holds license number 865.

2. Michael Dappolonis is and was at all times pertinent to this action a Naturopath licensed by the Florida State Board of Naurtopathy Examiners and holds license number 548.

3. During the periods from May, 1975 to June, 1975, Dr. Dappolonia treated one Suzzanne Carter who had been brought to him by her mother, Carol Carter. Miss Carter had experienced periods of fainting and blacking out.

4. The treatment of Miss Carter included the use of a diagnostic instrument, similar to a radioclast, which Dr. Dappolonia believed would help him determine the nature of a patient's problem and assist him in determining what types of medication might be useful in treating the problem.

5. As part of the treatment of Suzzanne Carter, Dr. Dappolonia prescribed a medication for Miss Carter to take to aid in the reduction of infection and elimination of headaches. Dr. Dappolonia informed Miss Carter that the only way that the pills would be able to help her was that if she believed the they would help her.

6. The treatment by Dr. Dappolonia druing the time indicated was unsuccessful in that she continued to and still experiences periods of fainting and blacking out.

7. Prior to and subsequent to being treated by Dr. Dappolonia for the periods of fainting and blacking out, Suzzanne Carter was treated by Dr. Gary Miller, a licensed medical doctor.

8. Dr. Miller was unable to determine the causes of the periods of fainting and blacking out and was unsuccessful in treating such symtoms in that they continued to exist.

9. The treatment of Suzzanne Carter by Dr. Dappolonia occured at the Na Pier

Clinic located at 1913 North Orange Avenue, Orlando, Florida, 32804. At the entrance to the clinic it is indicated that Dr. Dappolonia is both a doctor of Chiropractic and medical naturopathy.

10. Miss Carter and her mother knew or should have known that Dr. Dappolonia was authorized to and did use both the principles of chiropractic and naturopathy in the examination, diagnosis, and treatment of persons coming to the Na Pier Clinic.

11. Neither Suzzanne Carter nor her mother instructed Dr. Dappolonia to use only the principles of chiropractic when treating Suzzanne Carter.

12. When using the diagnostic instrument Dr. Dappolonia is doing so in his capacity as a licensed Naturopath.

13. When prescribing medication to Suzanne Carter, Dr. Dappolonia was doing so in his capacity as a licensed Naturopath.

CONCLUSIONS OF LAW

1. The Florida State Board of Chiropractic Examiners seeks to discipline Michael Dappolonia as a licensed chiropractor for using a diagnostic instrument, the use of which is not taught in the regular course of instruction in a college recognized by the Florida State Board of Chiropractic Examiners. The use of such a diagnostic instrument is prescribed by Rule 21D-1.01, FAC. As an indisputable element of establishing the violation of the cited rule the State Board would have to show that it has adopted a list of colleges which it recognizes for the purposes of this rule. Such a list would fall within the definition of a "rule" as found in Florida Statutes Section 120.52 (14) which states that a

> "... 'rule' means each agency statement of general applicability that implements, interprets, or pro-

scribes law or policy, ..."
The adoption of a list of colleges recognized by the State Board would be implementing Rule 21D-1.01 and as such would itself be a "rule". Such a "rule" would have to be adopted pursuant to the provisions of the Administrative Procedure Act and published in the Florida Administrative Code. Without such a validly adopted rule implementing Chapter 21D-1.01 there could not be a violation of that rule (21D-1.01) as would justify disciplinary action against a licensee.

The State Board failed to show that they had adopted any such colleges or colleges recognized by the State Board. Additionally a review of the Florida Administrative Code fails to indicate the publication of any such "rule" which sets forth the list of colleges recognized by the Florida State Board of Chiropractic Examiners. The conclusion is that there is no list of colleges recognized by the State Board which has been validly adopted and published. Lacking any such implementing rule it is therfore impossible to show a violation of Chapter 21D-1.01. The State Board therefore failed to show that the licensee used a

> ". . . diagnostic instrument . . . the use of which is not taught in the regular course of instruction in a college recognized by the Florida State Board of Chiropractic (Emphasis Added)

2. The State Board accuses the licensee of prescribing medication and using a diagnostic instrument in such a manner as to be a violation of Florida Statutes Section 460.13 (3) (f) (h) (m). Those sections read as follows:

> (f) making any untrue, false, fraudulent, misleading, deceptive, extravagant or grossly improbable claims or statements concerning the science or or practice of chiropractic;

> (h) that he is in any way guilty of any deception, misrepresentation or fraud in the practice of chiropractic;
>
> (m) that he is guilty of unprofessional conduct which is defined to mean: Any conduct which is reasonably likely to deceive or defraud the public; share an office space with any person illegally practicing any of the healing arts; the employing either directly or indirectly of any unlicensed chiropractic physician whose license has suspended; or the violation of the Code of Ethics or any provision thereof adopted by the Board.

It is specifically provided in (f) that the statements or claims must be specifically made with respect to the practice of chiropractic. The same specific requirement is found in (h). Subparagraph (m), however, does not expressly state that the proscribed conduct be with respect to the practice of chiropractic. Nevertheless that subsection must be interpreted as applying only to the practice of chiropractic as the State Board has no jurisdiction to discipline licensees unless they are engaging in an activity as a chiropractor. It is therefore required that in order to show a violation of any of the listed subsections, the complained of activity must have been in the capacity of a chiropractor.

The testimony fails to establish that in prescribing the medication or using the diagnostic instrument Dr. Dappolonia was acting as a chiropractor. The testimony and evidence does show that Dr. Dappolonia was treating Suzzanne Carter in his capacity as a naturopath when he prescribed medication and utilized the diagnostic instrument. Having failed to show that the complained of activities were in his capacity as a licensed chiropractor, the State Board is without authority to impose any sanctions on Dr.

Dappolonia.

3. The State Board's authority for proceeding agianst Dr. Dappolonia is found in Florida Statutes Chapter 460 which governs the practice of chiropractic in the State of Florida. Under Section 460.11 (2) a chiropractor is authorized, inter alia, to do the following:

> (a) examine, analyze and diagnose the human living body and its diseased by the use of any physical, chemical, electrical, or thermal method, and use the X ray for diagnosing and may use any other general method of examination for diagnosis and analysis taught in any school of chiropractic recognized and approved by the Florida State Board of Chiropractic Examiners. (b) chiropractic physicians may adjust, manipulate, or treat the human body by manual, mechanical, electrical or natural methods, or by the use of physical means. physiotherapy (including light, heat, water or exercise) or by the oral administration of food and food concentrates, food extracts, and may apply first aid and hygiene, but chiropractic physicians are expressly prohibited from prescribing or administering to any person any medicine or drug or from performing any surgery except as hereinabove stated or from practicing obstetrics. (Emphasis Added)

There is nothing in Chapter 460 which prohibits a licensed chiropractor to be licensed in any of the other methods or sciences of healing regulated by the State of Florida.

The Legislature has in fact recognized that chiropractors may be licensed in any other method or science of healing in the state by their adiption of specific exemtions from Chapter 460. Section 460.24 reads as follows:

> "460.24 CHAPTER NOT APPLICABLE TO OTHER HEALING PRACTICES. -- mothing in this chapter shallbe construed to apply to or in any manner interfere with any other method or science of healing in this state, the person practicing such other method or science of healing having been theretofore licensed to so practice under any law of this state."

Additionally Section 460.262 provides that Chapter 460:

> " . . . shall not be construed to apply to:
> (a) any physician of medicine, known as M.D., Osteopath, Podiatrist, Naturopath, Optometrist, Nurse, Pharmacist, Dentist or Mid-wife who are duly licensed by their respective state boards, and are practicing their professions within the purview of the statutes applicable to their respective profession;" (Emphasis Added)

The question therefore is whether or not Dr. Dappolonia was acting as a Naturopath when he was using a diagnostic instrument or prescribing medication. If Dr. Dappolonia was acting as a Naturopath then both of the above quoted exceptions would apply and there could be no violation of any provision of the Chapter relating to the practice of chiropractic.

The practice of natureopathy is defined in Florida Statutes Section 462.01 as follows:

> "For the purpose of this law natureopathy and naturopathy shall be construed as synonymous terms and are hereby defined to mean the use and practice of psychological, mechanical, and material health sciences to aid in purifying, cleansing and normal-

izing human tissues for the preservation or restoration of health, according to the fundamental principle of anatomy, physiology and applied psychology, as may be required. Naturopathic practice employs, among other agencies phytotherapy, dietetics, psychotherapy, suggestotherapy, hydrotherapy, zonetherapy, biochemistry, external applications, electrotherapy, mechanotherapy, mechanical and electrical appliances, hygiene, first aid, sanitation and heliotherapy;provided, however, that nothing in this chapter shall be held or construed to authorize any naturopathic physician licensed hereunder to practice materia medica or surgery or chiropractic, nor shall the provisions of this law in any manner apply to or affect the practice of osteopathy, chiropractic, Christian Science, or any other treatment authorized and provided for by law for the cure or prevention of disease and ailments."

Even the testimony of the chiropractor testifying on behalf of the State Board indicated that the complained of activities would be within the purview of the practice of naturopathy as defined by Florida Statutes. Dr. Dappolonia testified that he was treating Miss Carter in his capacity as a licensed Naturopath when prescribing medication and using the diagnostic instrument. There is no evidence to indicate that he was doing these things as a chiropractor. The only connection is that he was a licensed chiropractor as well as a licensed naturopath.

Even if there were a question left as to whether or not Dr. Dappolonia was acting as a chiropractor as opposed to a naturopath, it must be concluded that he was acting as a naturopath. When two constructions are possible, one classifying conduct as illegal

and the other classifying conduct as legal, then the latter must be assumed.

Having concluded both in fact and in law that Dr. Dappolonia was acting in his capacity as a naturopath and not a chiropractor when prescribing medication and utilizing a diagnostic machine, the two exceptions specifically exempt him from any disciplimary proceeding by the State Board of Chiropractic Examiners under Chapter 460.

RECOMMENDED ORDER

In view of the lack of any evidence indicating that the complained of activities on the part of Dr. Dappolonia were done in his capacity as a chiropractor and in view of the specific exemptions cited above it is hereby recommended that the charges filed against the license of Michael Dappolonia, the same being license number 865, which charges were filed by the Florida State Board of Chiropractic Examiners on the 2nd day of September, 1975 be dismissed as unfounded and not within the jurisdiction of the State Board of Chiropractic Examiners.

DONE AND ENTERED this ____day of_____, 1976. in Tallahassee, Florida.

_____
K. N. AYERS, Hearing Officer
Division of Administrative Hearings
Room 101, Collins Building
Tallahassee, Florida 32304

Copies to:

Ronald LaFace, Esq.
P.O. Box 1752
Tallahassee,
Florida 32303

John W. Bowen, Esq.
P.O. Box 305
Orlando, Florida
32802

Appendix C

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1977

MICHAEL DAPPOLONIA)
)
Petitioner,)
)
v.)
) CASE NO. 76-1757
BOARD OF CHIROPRACTIC)
EXAMINERS OF THE STATE OF)
FLORIDA,)
)
Respondent.)

Decision filed April 7, 1977

Petition for Writ of Certiorari to the Board of Chiropractic Examiners.

John W. Bowen of Rowland, Petruska, Bowen and McDonald, Orlando, for petitioner

Robert L. Shevin, Attorney General, and Carol L. Reilly, Assistant Attorney General, Tallahassee, for respondent.

PER CURIAM.

Petition for Writ of Certiorari is hereby DENIED.

DOWNEY, ANSTEAD AND LETTS. JJ., concur.

Appendix D

SUPREME COURT OF FLORIDA

FRIDAY, SEPTEMBER 23, 1977

MICHAEL DAPPOLONIA,)
)
Petitioner,) CASE NO. 51,819
)
v.) DISTRICT COURT OF APPEAL,
) FOURTH DISTRICT
BOARD OF CHIROPRACTIC)
EXAMINERS OF THE STATE)
OF FLORIDA,) DCA CASE NO. 76-1757
)
Respondent.)

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

OVERTON, C.J., ADKINS, SUNBERG, HATCHETT and KARL, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

sg
cc: Honorable Clyde L. Heath, Clerk

Messrs. Rowland, Petruska, Bowen & McDonald
Honorable Charles S. Ruberg

Appendix E

IN THE DISTRICT COURT OF APPEALS, FOURTH DISTRICT

MICHAEL DAPPALONIA Petitioner, v. BOARD OF CHIROPRACTIC EXAMINERS OF THE STATE OF FLORIDA Respondent.	)	Case No. 76-1757

NOTICE OF APPEAL TO
THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Petitioner, Michael Dappolonia hereby appeals to the Supreme Court of the United States from the final judgment, decision and opinion of the District Court of Appeal of Florida, Fourth District, Affirming the final order adopted by the Respondent Board, said final judgment became final upon the denial of a Petition for Rehearing which denial occurred on the 25th day of May, 1977; and Petitioner's petition for certiorari to the Florida Supreme Court having been denied on September 23, 1977.

This appeal is taken pursuant to 28 USC, 1257 (2).

All parties to this action are called upon to take Notice of this appeal.

s/ J. Michael Carter
J. Michael Carter
Attorney for Petitioner
P.O. Box 566

Crawfordville, Florida
32327
(904) 926-3647

CERTIFICATE OF SERVICE

I, J. Michael Carter, a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of October, 1977, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United State on Respondent, Board of Chiropractic Examiners of the State of Florida by mailing copies in duly addressed envelopes, with first class postage prepaid, to its attorneys of record as follows: Robert Shevin, Attorney General, and Carol L. Reilly, Assistant Attorney General, Tallahassee, Florida.

s/ J. Michael Carter
J. Michael Carter
Attorney for Petitioner

Supreme Court, U. S.
FILED
JAN 20 1978
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT

of the

UNITED STATES

October Term, 1977

CASE NO. 77-883

MICHAEL DAPPALONIA,

Appellant,

vs.

BOARD OF CHIROPRACTIC EXAMINERS
of the STATE OF FLORIDA,

Appellees.

ON APPEAL FROM THE FOURTH
DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA

MOTION TO DISMISS OR AFFIRM

ROBERT L. SHEVIN
Attorney General

CHARLES S. RUBERG
Assistant Attorney General
Department of Legal Affairs
The Capitol, Room 1501
Tallahassee, Florida 32304

Attorneys for Appellees

INDEX

	Page(s)
TABLE OF CITATIONS	ii,iii, iv,v
MOTION TO DISMISS OR AFFIRM	2
THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE	2
A. THE STATUTES	2
B. THE PROCEEDINGS BELOW	4
ARGUMENT	11
CONCLUSION	29
PROOF OF SERVICE	31
APPENDIX A	
APPENDIX B	
APPENDIX C	
APPENDIX D	

TABLE OF CITATIONS

	Page(s)
Amalgated Food Employees Union v. Logan Valley Plaza 391 U.S. 308, 334	22
Bowe v. Scott 233 U. S. 658	21
Buchman v. State Board of Accountancy 300 So.2d 671 (Fla.1974)	23
Cardinals v. Louisiana 394 U. S. 437, 438	19
Equitable Life Assurance Soc. v. Brown 187 U. S. 308, 311	23
Harding v. Illinois 196 U. S. 78	21
Herndon v. Georgia 295 U. S. 441	21
Lathrop v. Donohue 367 U. S. 820, 824 6 L.Ed.2d 1191, 1195 81 S.Ct. 1826 (1961)	13
Largent v. Texas 318 U. S. 418	22
Live Oak Water Users Assoc. v. Railroad Commission 269 U. S. 354 70 L.Ed. 305 (1926)	14, 19

TABLE OF CITATIONS

Lynch v. New York ex rel. Pierson
293 U. S. 52 19

New York ex rel. Bryant v. Zimmerman
278 U. S. 63 21

Oxley Stove Co. v. Butler County
166 U. S. 648, 655 20, 21

Palmer OilCorp. v. Amerado Corp.
343 U. S. 390 23

Safeway Stores v. Oklahoma Grocers
360 U. S. 334, 342 19

Smith v. Dept. of Registration and Education
412 Ill. 332, 106 NE 2d 922 24

Stuckey's Eastman, Georgia v. Dept. of Transportation
340 So.2d 119
(Fla. 1st DCA 1976) 10 ,11

Williams v. Bruffy
96 U. S. 176, 183 13

Zucht v. King
260 U. S. 174 23

TABLE OF CITATIONS

OTHER

Florida Statutes

Sec. 120	5, 9, 10
Sec. 120.52(9) and (14)	14
Sec. 120.53(1)(d)	7
Sec. 120.54	15, 16
Sec. 120.54(1)	7
Sec. 120.55(1)(c)	7
Sec. 120.57	15
Sec. 120.57(1)	5,24
Sec. 120.57(1)(a)(1)	6
Sec. 120.57(1)(b)(3)	6
Sec. 120.57(1)(b)(2)	6
Sec. 120.57(1)(b)(4)	6
Sec. 120.57(1)(b)(8)	6
Sec. 120.57(1)(b)(5)	7
Sec. 120.57(1)(b)(9)	7, 28
Sec. 120.59(1)	8
Sec. 120.59(2)	10
Sec. 120.68(2)	8

TABLE OF CITATIONS

Florida Statutes (cont.)

Sec. 460	4
Sec. 460.11	4
Sec. 460.13(3)(n)	4
Sec. 460.13(3)(h) and (n)	16
Sec. 460.13(3)(f)(h) and (m)	4
Sec. 460.24	9
Sec. 460.262	9

Florida Administrative Code

21D-1.01	4

Florida Appellate Rules

Rule 4.1	8

Florida Constitution

Article I, Sec. 9	21
Article V, Sec. 3	10
Article V, Sec. 4	9

28 U.S.C. Sec. 1257(2)	2, 11, 12, 13, 18

In the

SUPREME COURT

of the

UNITED STATES

October Term, 1977

CASE NO. _____

MICHAEL DAPPALONIA,

Appellant,

vs.

BOARD OF CHIROPRACTIC EXAMINERS
of the STATE OF FLORIDA,

Appellees.

ON APPEAL FROM THE FOURTH
DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA

MOTION TO DISMISS OR AFFIRM

MOTION TO DISMISS OR AFFIRM

The Appellee in the above-entitled case moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Fourth District Court of Appeal of Florida on the grounds that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on by the Court below, that the question presented is so unsubstantial as not to need further argument, that the judgment below rests on an adequate non-federal basis, and that in the proceedings below the Appellant was accorded procedural and substantive due process of law which exceeded the minimum requirements in that regard as guaranteed by the Fourteenth Amendment to the United States Constitution such that after due notice, a full evidentiary hearing, and two judicial review procedures, the decision below, in Appellee's favor, is not in conflict with any decision of this Court, and is so obviously correct as to warrant no further review.

I.

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. THE STATUTES

This appeal is brought pursuant to the authority of 28 U.S.C., §1257(2), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

However, nowhere in his Jurisdictional Statement does Appellant cite any provision of the Florida Statutes, which is the official codification of general laws enacted by the legislature of this State, or the Laws of Florida, which is the official compilation of the enactments of the Florida legislature in each annual legislative session, for the purpose of claiming its repugnancy to the Fourteenth Amendment to the Constitution of the United States. Likewise, Appellant has failed to cite any provision of the Florida Administrative Code, which is the official codification of rules and regulations of the agencies of the executive branch of government of this State, including the Board of Chiropractic Examiners, for this purpose.

B. THE PROCEEDINGS BELOW

On September 2, 1975, the FLORIDA STATE BOARD OF CHIROPRACTIC EXAMINERS (hereinafter Board) issued an Administrative Complaint against Michael Dappalonia, D.C., the Appellant, which is incorporated herein as Appendix A. The Board was seeking to revoke, annul, withdraw or suspend Dr. Dappalonia's license to practice chiropractic upon allegations set out in three counts. Count I charged Dr. Dappalonia with violations of §460.13(3)(n), F.S., and Rule 21D-1.01, Florida Administrative Code.

Section 460.13(3)(n), Florida Statutes, authorizes the revocation or suspension of a license to practice chiropractic upon proof of guilt of violating any of the provisions of Ch. 460, F.S., (regulating the profession of chiropractic), or any of the rules and regulations of the Board. Rule 21D-1.01, F.A.C., implements the scope of practice limitations of §460.11, F.S., by prohibiting the use of diagnostic or treatment instruments, the use of which are not taught in the regular course of instruction in approved colleges of chiropractic. The Complaint alleged that Dr. Dappalonia utilized such an instrument on one of his patients.

Counts II and III charged Dr. Dappalonia with violations of Sections 460.13(3)(f)(h) and (m), F.S. These

provisions permit a revocation or suspension upon proof of: making any untrue, false, fraudulent, misleading, deceptive, extravagant, or grossly improbable claims or statements, concerning the science or practice of chiropractic; being in any way guilty of deception, misrepresentation, or fraud in the practice of chiropractic; and being guilty of unprofessional conduct, which is defined in relevant part to mean any conduct which is reasonably likely to deceive or defraud the public.

The alleged conduct supporting these charges was Dr. Dappalonia's use of the afore-described instrument, his claims and representations regarding it, his prescription of purported medication, alleged to be sugar pills, and his claims and representations regarding them to the same patient described in Count I.

Also, included in the Administrative Complaint was a detailed explanation of Dr. Dappalonia's rights pursuant to the Florida Administrative Procedure Act, Ch. 120, F.S., and a form which he could check-off and return indicating his election of the type of adjudicatory proceeding he desired. Dr. Dappalonia elected a formal proceeding pursuant to §120.57(1), F.S.

Consequently, the assignment of the case to a Hearing Officer of the Division of Administrative Hearings, Department of Administration was requested and granted. §§120.57(1)(a)(1) and (1)(b)(3), F.S. After reasonable notice, §120.57(1)(b)(2), F.S., including ample time for preparation, a full evidentiary hearing was conducted before the aforesaid, independent Hearing Officer, on January 26, 1976.

At this hearing Dr. Dappalonia was represented by the attorney of his choice and was guaranteed the rights to respond to the allegations, present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, and to file exceptions to any order or hearing officer's recommended order, §120.57(1)(b)(4), F.S.

Dr. Dappalonia, and his attorney, had the opportunity to and did utilize whichever of these rights they deemed to be in his best interest.

On April 16, 1976, the Hearing Officer issued his Recommended Order consisting of his separately stated findings of fact, conclusions of law, and recommended penalty, and submitted the said Order to the Board and to Dr. Dappalonia, as required by §120.57(1)(b)(8), F.S. Pursuant to this same statute, Dr. Dappalonia had ten days within which to submit to the Board

written exceptions to the recommended Order, but chose not to do so.

On July 15, 1976, the Board held a public meeting at Orlando, Florida, which was its next regularly scheduled business meeting subsequent to receipt of the Hearing Officer's Recommended Order regarding Dr. Dappalonia. Notice of this meeting was published at least fourteen days prior thereto in the Florida Administrative Weekly, a publication of this State through the Florida Department of State which serves as the official organ through which the public may be informed of the activities of the agencies of this State. See §§120.53(1)(d), 120.54(1), 120.55(1)(c), F.S. Copies of the agenda of the meeting were available to the public at least seven days prior thereto, pursuant to §120.53(1)(d), F.S., and included the consideration of and action on the Recommended Order regarding Dr. Dappalonia.

There being no exceptions to the Recommended Order, submitted to the Board either by its Special Prosecutor, who had represented the Board before the Hearing Officer, or by Dr. Dappalonia, the Board was limited to consideration of those matter which constituted the record of the proceedings pursuant to §120.57(1)(b)(5), F.S. Further, the Board's authority to act had to be within the limitations of §120.57(1)(b)(9), F.S., which precludes

rejection or modification of the Hearing Officer's findings of fact except under circumstances not material here, precludes imposition of a more severe penalty than recommended with a similar exception, and permits the Board to substitute its conclusions of law for that of the Hearing Officer which was deemed not necessary in this case.

The Board voted unanimously to adopt, in toto, the Recommended Order, and thereafter a Final Order implementing this decision was reduced to written form and served on Dr. Dappalonia pursuant to §120.59(1), F.S.

Dr. Dappalonia sought judicial review of Board's Final Order pursuant to §120.68(2), F.S., to the appropriate district court of appeal of Florida. By Rule 4.1, Florida Appellate Rules, such petitions for review of agency action are by certiorari as otherwise provided by the Florida Appellate Rules.

Dr. Dappalonia's "Petition For A Writ Of Certiorari To The Board of Chiropractic Examiners," incorporated herein as Appendix B asserted that the Board's Final Order "departed from the essential requirements of law" in four particulars, to-wit: (1) the Board failed to follow the procedures required by the Florida Administrative

Procedures Act, Ch. 120, F.S., by failing to permit oral argument by Dr. Dappalonia's legal counsel at the time of consideration of the Recommended Order and by failing to include in its Final Order rulings on Dr. Dappalonia's proposed findings of fact and requested conclusions of law; (2) there were no findings of fact that Dr. Dappalonia was acting as a chiropractor when using the diagnostic instrument in question; (3) the Board exceeded its authority in rendering its final order contrary to §§460.24 and 460.262, F.S.; and (4) Dr. Dappalonia could not be guilty of using a diagnostic instrument not taught at approved colleges of chiropractic because the Board had not validly adopted any list of approved colleges.

After receiving briefs from the respective parties, on the issues so raised, the District Court of Appeal for the Fourth District of Florida, in a per curiam order without written opinion, denied the Petition for Writ of Certiorari, on April 7, 1977. Dr. Dappalonia's Petition for Rehearing incorporated herein as Appendix D, was considered and denied on May 25, 1977.

Subsequently, Dr. Dappalonia filed with the Florida Supreme Court, a "Petition For A Writ Of Certiorari To The District Court of Appeal, Fourth District," which is incorporated herein as Appendix C. This petition, although erroneously relying on Article 5, Section 4, Florida Constitution,

relating to the jursidction of the district courts of appeal, was obviously intended to be grounded on Article V, Section 3, Florida Constitution, and more specifically on subsection (b), paragraph 3, thereof, which confers, in relevant part, certiorari jurisdiction on the Supreme Court as to a decision of a district court of appeal "that is in direct conflict with a decision of any district court of appeal or of the Supreme Court on the same question of law. . . ."

The sole issue so presented was whether or not the Board's order departed from statutory requirements (§120.59(2), F.S.) by failing to include explicit rulings on each finding of fact and conclusion of law submitted by Dr. Dappalonia, so that the Fourth District Court of Appeal's denial of certiorari constituted a decision in conflict with the decision of the First District Court of Appeal in Stuckey's of Eastman, Georgia v. Department of Transportation, 340 So.2d 119 (Fla. 1st D.C.A., 1976).

In essence, Dr. Dappalonia argued that failure to provide such explicit rulings on issues presented by him denied him the rights secured by the Administrative Procedure Act, Ch. 120, F.S., to-wit:

> "... the right to raise pertinent factual issues for administrative determination, to submit proposed findings on those issues, to receive an explicit ruling on the matters thus submitted and to preserve them for Judicial review." Stuckey's at 120.

The Board's counter argument was essentially that no issues were presented by Dr. Dappalonia's Proposed Recommended Order, submitted to the Hearing Officer, which were not explicitly or by necessary implication determined in the Recommended Order issued by the Hearing Officer which was adopted, in toto, and incorporated in the Board's Final Order, thus creating no conflict.

On September 23, 1977, the Florida Supreme Court denied Dr. Dappalonia's Petition on the ground that it was without jurisdiction.

The instant appeal was thereafter initiated.

II.

ARGUMENT

THE UNITED STATES SUPREME COURT HAS NO JURISDICTION TO HEAR THIS APPEAL PURSUANT TO THE AUTHORITY OF 28 U.S.C., §1257(2)

By his own assertion, Appellant is seeking to invoke the jurisdiction of this Court by authority of 28 U.S.C., §1257(2), which reads:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Appellee will concede that the per curiam order without opinion of the Fourth District Court of Appeal of Florida, which denied Dr. Dappalonia's Petition for Writ of Certiorari to review the Appellee's Final Order, constitutes a final decree by the highest court of this State in which a decision could be had, in view of the decision of the Florida Supreme Court that it had no jurisdiction to undertake judicial review.

However, at no point in the proceedings below was there a challenge to the validity of any "statute" of the State of Florida on the grounds of its being repugnant to the Constitution or any law of the United States. Consequently, the decision appealed from cannot be said to favor the validity of such statute as against such challenge.

Therefore, it must be assumed that Appellant is contending that the "statute" for purposes of Section 1257 (2) jurisdiction is the Final Order of the Board or is somehow the entire process by which his license was revoked. Such a contention must fail.

Although this Court has many times defined the term "statute" as used herein to include every legislative action to which a state gives the force of law, it is the exertion of the State's law-making power, regardless of the State agency exercising such power, by an act which is legislative in character which gives rise to this Court's jurisdiction. Lathrop v. Donohue, 367 U.S. 820, 824, 6 L.ed.2d 1191, 1195, 81 S.Ct. 1826 (1961). See also Williams v. Bruffy, 96 U.S. 176, 183.

In the Lathrop case, supra, the State action in question was an order of the Wisconsin Supreme Court integrating the Bar of that state for the

purpose of regulating the practice of law. The legislative character of that action was clear because of the general applicability of that order to all persons similarly situated. Likewise in the case of Live Oak Water Users' Asso. v. Railroad Commission, 269 U.S. 354, 70 L.Ed. 305 (1926), an order of a regulatory commission of the State of California was deemed to be a "statute" for jurisdictional purposes, but again this was an order which fixed the rates chargeable by a public utility and as such was also an action of general applicability to a class of affected persons.

Under Florida law a clear distinction has been made between acts of governmental agencies which may be said to be legislative in nature and those which are adjudicatory in nature. Sections 120.52(9) and (14), Florida Statutes, respectively provide definitions for the terms "order" and "rule" as applied to actions by administrative agencies of this State, specifying:

> "'Order' means a final agency decision which does not have the effect of a rule and which is not excepted from the definition of a rule, whether affirmative, negative, injunctive, or declaratory in form. ...;

> 'Rule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. ..."

Clearly, it was intended that "rules" would include all administrative actions,legislative in character, by an agency, and "orders" would include actions which were adjudicatory in nature. The Appellee obviously intended its proceedings against Dr. Dappalonia to be for the entry of an order, adjudicating his privilege to practice chiropractic, and not for the adoption of a rule, having general applicability to persons affected by Board action. Had the contrary been the case, the Board would have followed the rule adoption procedures set out in §120.54, F.S., rather than the provisions controlling actions which determine a party's substantial interests included in §120.57, F.S., which provisions were scrupulously followed in the administrative forum, as supported by the orders affirming this by the Florida District and Supreme Courts.

At no point in the proceedings below did Appellant assert any claim that the Board was,in fact, engaged in rule adoption proceedings or that any provision of §120.54, F.S., should have been applicable. Therefore, there is no foundation in the record to support a contention in favor of the legislative character of the challenged state action.

Any confusion on this point is generated by the manner in which Appellant chose to describe the Board's action. On page 4 of his Jurisdictional Statement, Appellant states:

> "On April 16, 1976, the Hearing Officer issued a Recommended Order deciding that Dr. Dappalonia was not guilty of prescribing medication as a Naturopath; but as a chiropractor was guilty of using a diagnostic instrument not taught in regular course of instruction in a college recognized by the Board of Chiropractic Examiners, and recommended that his Chiropractor's license be revoked."

This very imprecise description merely clouds the issue. The Board's Administrative Complaint very clearly charged Dr. Dappalonia with engaging in conduct which constituted, inter alia, violations of §§460.13(3)(h) and (n), F.S., which authorize revocation

where the chiropractic licensee: "... is in any way guilty of any deception, misrepresentation, or fraud in the practice of chiropractic; or has violated . . . any of the rules and regulations of the board." The Hearing Officer very specifically concluded that Dr. Dappalonia had violated both of these provisions.

The violations were not merely a result of his using a diagnostic instrument not taught at approved chiropractic colleges, but because the expert testimony revealed that the machine could not perform the functions which Dr. Dappalonia claimed it could, even over his patients' expressed skepticism.

Nonetheless, Appellant must avoid a clear description of the findings and conclusions resulting from the full, evidentiary hearing in order to support the line of defense he has consistently maintained. More specifically, Appellant merely claims that any of his acts which violate the provisions regulating chiropractic are done pursuant to his naturopath license, as to which discipline the Board of Chiropractic Examiners has no authority. Presumably, had the Board of Naturopathic Examiners brought a disciplinary action, he would have claimed that all of his actions were under authority of his chiropractic license.

Of course, none of this can change the facts: that a patient suspecting a pinched nerve problem expressly sought his chiropractic services; that he used a phony machine to diagnose the problem as insecticide poisoning, an ailment as to which she had no symptoms according to her family medical doctor; that he purported to treat her for this non-existing condition with sugar pills, stressing that they would not work unless she "believed in them"; that his treatment, of course, had no effect; and that he made a number of clearly misleading and deceptive representations in order to overcome the patient's skepticism.

From the foregoing, it is submitted that because of the nature of the proceedings below, no decision was ever rendered that could be construed as upholding the validity of any statute of this State for Section 1257(2) purposes, against any claim of repugnancy to the United State's Constitution.

Further, even if such a "statute" is assumed, arguendo, a review of the proceedings below reveals that no federal question was ever raised, and certainly was never raised with the specificity required for Section 1257(2) jurisdiction.

There was no reference, whatsoever, to any provision of the U. S. Constitution in the Board's Administrative Complaint, the Hearing Officer's Recommended Order, the Board's Final Order, nor in either per curiam denial of certiorari by the Florida Fourth District Court of Appeal and the Florida Supreme Court.

It is axiomatic that once a case reaches this Court, review is limited to specific federal questions that were properly raised in the State courts. Live Oak Water Users Association v. Railroad Commission, 269 U.S. 354, 357-8; Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54. Likewise, a litigant is precluded from urging a federal issue that was not raised or decided below even though such an issue could have been so raised. Safeway Stores v. Oklahoma Grocers, 360 U.S. 334, 342, n.7; Cardinals v. Louisiana, 394 U.S. 437, 438.

Appellant has taken no issue with the procedures followed in the administrative forum up to that point where the Hearing Officer issued his Recommended Order and caused its delivery to both the Board and to Dr. Dappalonia. In essence, Appellant's contention before this Court is that he was denied his right to due process of law, as guaranteed by the Fourteenth Amendment to the U. S. Constitution, because: (1) he did not receive notice as to

when the Board would consider and take action on the Recommended Order; and (2) his attorney was not permitted to present oral arguments to the Board prior to such consideration and action.

It is **true** that in his Petition for Writ of Certiorari filed with the Fourth District Court of Appeal, Appellant claimed that the Board had failed to permit oral argument, although the notice issue was not mentioned at all. However, this claim was based upon the ground that the Board's Order "departed from the essential requirements of law." There is not even a reference to any provision of the U. S. Constitution.

In the case of Oxley Stove Co. v. Butler County, 166 U.S. 648, 655, this Court enunciated, and has subsequently followed, the principle that:

> "The jurisdiction of this Court to reexamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

As a result, the reference to the U. S. Constitution in the Oxley Stove case, supra, was deemed insufficient as were similar references in Herndon v. Georgia, 295 U.S. 441, 442-3, and Harding v. Illinois, 196 U.S. 78,88. Likewise, a reference to "due process of law" was held insufficient in Bowe v. Scott, 233 U.S. 658,664-5.

Thus, even if it is assumed that "departure from the essential requirements of law" involves concepts of constitutionally guaranteed due process of law, the assumption to be made is that reference is being made to a State Constitution. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67-8. This is particularly true if a State Constitution has a due process clause, such as Section 9, of Article I of the Florida Constitution which reads:

> "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself. (Emphasis supplied.)

See Bowe v. Scott, supra.

There can be no doubt that Dr. Dappalonia failed to properly raise a federal question before the Fourth District Court of Appeal. In his Petition for Rehearing before that Court, he merely argued that the denial of certiorari, as against his contention that the Board had failed to meet the requirements of the Administrative Procedure Act regarding the rejection of his proposed findings, was in conflict with a decision of the First District Court of Appeals. Likewise, in his Petition for Writ of Certiorari filed with the Florida Supreme Court, the only ground presented to invoke the jurisdiction of that Court was the alleged conflict of decisions on that point.

Since no explicit challenge on federal grounds was ever raised or decided, the authority of 28 U.S.C., §1257(2) cannot be used to invoke the jurisdiction of this Court. Largent v. Texas, 318 U. S. 418. Further, this rule is deemed to be not discretionary but jurisdictional. Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 334.

Appellee recognizes that this Court may take jurisdiction of a case by certiorari pursuant to 28 U.S.C., §1257(3), even where it is presented by appeal pursuant to 28 U.S.C., §1257(2). Further, it is submitted

that Appellant's own Jurisdictional Statement makes abundantly clear that he should be seeking this review by certiorari and not by appeal. Any reasonable reading of the said Jurisdictional Statement demonstrates that his real contention is that certain aspects of the process by which his license was revoked denied him rights which he held by virtue of the U. S. Constitution.

Nevertheless, regardless of whether review is sought by appeal or certiorari, the element of the substantiality of the federal question must be clearly shown. The federal question presented must be more than a formal one. It cannot be so absolutely devoid of merit as to be frivolous. Likewise, it cannot be so foreclosed by prior decisions, so as to leave no room for real controversy. Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311. Furthermore, if the federal question does not meet these standards, it is insubstantial and there exists cause for dismissal of the appeal or denial of certiorari. See Zucht v. King, 260 U.S. 174; Palmer Oil Corp. v. Amerado Corp., 343 U.S. 390.

On page 9 of his Jurisdictional Statement Appellant has cited the cases of Buchman v. State Board of Accountancy, 300 So.2d 671 (Fla. 1974),

and Smith v. Department of Registration and Education, 412 Ill. 332, 106 NE 2d 722. By authority of these cases, he asserts that in administrative proceedings, such as in the instant case, due process of law must be offered to the person subject to the administrative authority, and that such due process requires a definite charge, adequate notice, and a full, fair, and impartial hearing. Appellee agrees.

The administrative action against Dr. Dappalonia was initiated by the Board's issuing and serving on Dr. Dappalonia by certified mail an Administrative Complaint. The said Complaint set out specifically the conduct alleged to constitute the violations and further specified the statutes and rules alleged to have been violated. The Complaint also put him on notice of the Board's intent to seek revocation or suspension of his license on the basis of those allegations, and further put him on notice of his rights under the Administrative Procedure Act, which is specifically designed to guarantee due process of law.

Dr. Dappalonia elected a formal proceeding which in turn requires the strictest standards of due process among his available options. Consequently, in order to guarantee fairness and impartiality, §120.57(1),

F.S., requires such proceedings to be conducted by a full time, qualified hearing examiner whose only connection with the Board is that he sometimes may hear their cases along with those arising from other state agencies. Such a hearing officer was duly assigned.

Dr. Dappalonia had the opportunity to file a responsive pleading to the Administrative Complaint, but did not. There was a full two-month period between issuance of the Complaint and the evidentiary hearing itself, giving ample time for discovery, all forms of which are available in this State to litigants in administrative cases, the same as are available to litigants in civil cases before Florida courts. There was ample notice of the date, time, and place in which the hearing was to be conducted.

The hearing itself was conducted essentially as a civil trial before a court, except for the additional privilege against self-incrimination accorded to Respondents in revocation proceedings. Evidence and testimony was offered by both sides, cross-examination was made, arguments of respective legal counsel was heard and on the basis of the record so established the Hearing Officer made findings of fact, conclusions of law, and recommended the penalty of revocation.

It should be noted that from the time the Complaint issued until the Board and Dr. Dappalonia received the Recommended Order, no member of the Board attended, was directly involved in, nor received any information concerning the course of the proceedings. The prosecution of the charges is left to a Special Prosecutor who represents the Board before the hearing officer and who is an attorney other than the Board's regular legal advisor.

The purpose of this is obvious, it insures fairness and impartiality because there is assurance that in rendering a final order, the Board will limit its consideration to the established record as required by law.

At no point, including this appeal, has Appellant raised any objection on due process or other grounds regarding the proceedings up to the point of rendering and service of the Recommended Order. Appellant did not contest the Recommended Order at any time between its issuance or the Board's consideration thereof, even though he had by statute ten days in which to file exceptions thereto with the Board. There being no such exceptions the Board had nothing to consider apart from the record of the proceedings before the hearing examiner.

Therefore, Appellant's claim that he was denied due process because his attorney was not allowed to present oral arguments to the Board is totally insubstantial, without merit and frivolous.

Even if such arguments were permitted, they could not have interjected any new evidence into the proceedings, and Appellant's attorney had ample opportunity and did argue: all issues raised; his view of the probative value and effect of the evidence; and his legal theories of the case before the hearing officer. At this point it should also be noted that no arguments were presented to the Board by its Special Prosecutor, who did not attend the meeting, and that at no time, including this appeal, has Appellant objected on the basis of a lack of substantial, competent evidence to support the Hearing Officer's findings.

Appellant's claim, now raised for the first time, that he was denied due process because he did not receive notice of the meeting at which the Recommended Order was to be considered and acted on, is equally insubstantial, without merit, and frivolous. Since there were no exceptions filed, there was no cause for the

Board to anticipate any request for oral argument by Appellant, and therefore no need to give notice by mail or personal service on him.

Nonetheless, Appellant should have had ample notice of the meeting. Pursuant to §120.57(1)(b)(9), F.S., Appellant knew that the Board would have to render its Final Order within ninety days of receipt of the Recommended Order. The Board can only conduct business in a public meeting. Notice of all such meetings must be published in the Florida Administrative Weekly which is readily available in courthouses and libraries throughout the State, and certainly can be checked by a telephone call to its publisher, the Florida Department of State. Notice of the meeting in question was published at least two weeks prior thereto, and included a statement that copies of the agenda were available from the Board's offices, specifying the address. The agenda clearly stated under "Old Business," item 6A, that the Board would "consider the Recommended Order of the Hearing Officer in the case for the revocation or suspension of the license of Dr. Michael Dappalonia."

For the reasons set out in the foregoing it is submitted that Appellant has asserted no grounds on which

to invoke the jurisdiction of this Court either by appeal or certiorari.

III.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on by the Court below, that the question presented is so unsubstantial as not to need further argument, that the judgment below rests on an adequate non-federal basis, and that in the proceedings below the Appellant was accorded procedural and substantive due process of law which exceeded the minimum requirements in that regard as guaranteed by the Fourteenth Amendment to the United States Constitution such that after due notice and hearing, and two judicial review procedures, the decision below, in Appellee's favor, is not in conflict with any decision of this Court, and is so obviously correct as to warrant no further review, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment in the cause by

the District Court of Appeal for the Fourth District of Florida.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

Charles S Ruberg

CHARLES S. RUBERG
Assistant Attorney General
Department of Legal Affairs
The Capitol, Room 1501
Tallahassee, Florida 32304

Attorneys for Appellees.

PROOF OF SERVICE

I, CHARLES S. RUBERG, one of the Attorneys for Appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19 day of January, 1978, I served a copy of the foregoing Motion to Dismiss or Affirm on:

J. MICHAEL CARTER, ESQUIRE
P. O. Box 566
Crawfordville, Florida 32327

by mailing a true and correct copy, in a dully addressed envelope, with postage prepaid, to the named attorney of record for Appellant.

Charles S Ruberg

CHARLES S. RUBERG

The Capitol, Room 1501
Tallahassee, Florida 32304

APPENDIX A

STATE OF FLORIDA, DIVISION OF PROFESSIONS, DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION, FLORIDA STATE BOARD OF CHIROPRACTIC EXAMINERS

In re the revocation or suspension
of the license of MICHAEL DAPPOLONIA,
D.C.
License No: 865

/

ADMINISTRATIVE COMPLAINT, EXPLANATION AND ELECTION OF RIGHTS

The Florida State Board of Chiropractic Examiners, hereinafter Board, upon knowledge and belief, files this Administrative Complaint against licensee, MICHAEL DAPPOLONIA, D.C., who holds license number 865. The Board seeks to revoke, annul, withdraw or suspend the referenced license and the licensee's right to practice thereunder based upon the following allegations:

Count I.

1. On or about a period from May, 1975, to June, 1975, licensee treated one Suzzanne Carter approximately three times per week. Prior to and during this period of treatment, Miss Carter had experienced and continued to experience periods of fainting and blacking out.

2. Treatment of Miss Carter by licensee included the use of a diagnostic instrument, the use of which is not taught in the regular course of instruction in a college recognized by the Florida State Board of Chiropractic Examiners.

3. Use of such an instrument violates Rule 21D-1.01, Rules of the State Board of Chiropractic Examiners, and as such constitutes a violation of Section 460.13(3)(n), Florida Statutes.

Count II.

4. The Board herein specifically adopts and realleges the matters as set forth in paragraphs 1 through 3 above.

5. That during the period of treatment described in paragraph 1 above, Suzzanne Carter received medication from the licensee in the form of tablets marked "I-Celoids" as well as other tablets, such tablets being prescribed at the rate of five (5) per hour.

6. Licensee represented to Suzzanne Carter that said pills were given to aid in the reduction of infection and elimination of headaches, when licensee knew or should have known that said pills were composed of a disaccharide or sugar and, therefore, could not reasonably be expected to produce the results as represented to Miss Carter and did not in fact produce those results.

7. Such misrepresentation, fraud and deception on the part of licensee as described above constitute violations of Sections 460.13(3)(f)(h) and (m), Florida Statutes.

Count III.

8. The Board herein specifically adopts and realleges the matters as set forth in paragraphs 1 through 7 above.

9. That during the period of treatment described in paragraph 1 above, licensee represented to Suzzanne Carter that through the use of the diagnostic instrument referenced in paragraph 2, licensee could measure Miss Carter's levels of vitality and infection, determine whether any bodily organ was malfunctioning and locate such a malfunction, when licensee knew or should have known that said instrument was incapable of making such determinations and did not in fact make such determinations.

10. Such misrepresentation, fraud and deception on the part of licensee as described above constitute violations of Sections 460.13(3)(f)(h) and (m), Florida Statutes.

WHEREFORE, this Administrative Complaint is issued pursuant to §120.60, Florida Statutes, and Chapter 460, Florida Statutes. Any proceeding concerning this Complaint shall be conducted pursuant to §120.57, F.S.

You have a right to request an administrative hearing, to be represented by counsel, to take testimony, to call and cross-examine witnesses, to have subpoena and subpoena duces tecum issued, and to present written evidence or argument if you request a hearing.

Pursuant to §120.60, F.S., you are given fourteen (14) days notice by certified mail of this action. Unless a request for hearing is received by certified mail on or before September 19, 1975, the Board will act in accord with §120.57(2), F.S., and dispose of this cause. A request for a hearing shall be sent to the Board of Chiropractic Examiners, Building B, Suite 202, 6501 Arlington Expressway, Jacksonville, Florida, 32211, and must include the following information:

(a) your name and address,

(b) a statement requesting a hearing,

(c) a copy of this administrative complaint.

II. EXPLANATION OF RIGHTS

In response to the allegations as set forth above in this administrative complaint, you may make any one of the following elections within 14 days from receipt of said administrative complaint:

1. If you determine that the allegations as set forth above contain no disputed issue(s) of material fact, you may then request an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the Board of Chiropractic Examiners, or in discretion of the Board of Chiropractic Examiners, a duly appointed member thereof, or another hearing officer appointed by the Board of Chiropractic Examiners, may be designated. In the event that you request an informal proceeding as contemplated by Section 120.57(2), Florida Statutes, you will be given an opportunity to present written evidence in mitigation of or in opposition to the agency's action or refusal to act as well as to the grounds upon which the agency has chosen to justify its action or inaction. At your request, and within the sole discretion of the Board of Chiropractic Examiners, you may be permitted an opportunity to personally appear before the Board of Chiropractic Examiners, in support of your written statement. Any request for an informal proceeding in this matter should be directed to the Board of Chiropractic Examiners in writing within 14 days of receipt of this Complaint.

2. If you determine that the allegations as set forth above contain any disputed issue(s) of material fact, you may request a formal proceeding and the appointment of a hearing officer to be furnished by the Division of Administrative

Hearings of the Department of Administration, pursuant to Section 120.57(1), Florida Statutes. Any request for a formal proceeding in this matter must be made in writing and directed to the Board of Chiropractic Examiners, Building B, Suite 202, 6501 Arlington Expressway, Jacksonville, Florida, 32211. Such request must contain the following information:

(a) your name and address,

(b) a request for hearings,

(c) a copy of the administrative complaint.

In the event that you fail to file a responsive pleading in this matter as enumerated in and required by paragraphs 1 or 2 above, within 14 days as provided above, your failure shall be considered as a waiver of your rights to a hearing as provided by Sections 120.57(1), Florida Statutes, and shall be cause for holding you in default and a default order may thereupon be rendered and the cause determined upon consideration of the record without any further notice to you in accordance with the disciplinary powers of this Board as enumerated in §460.138, Florida Statutes.

Mailed this 2nd day of September, 1975.

DR. EDWARD M. SAUNDERS
President, Board of Chiropractic Examiners

DR. PAUL VOGEL
Secretary-Treasurer
Board of Chiropractic Examiners

ELECTION OF RIGHTS

Signify your election by designation of the appropriate box.

1. I have read the Explanation of Rights section and understand the various options.

____ YES ____ NO

If you do not understand the options available, contact the Board for further explanation.

2. I do not dispute the allegations in the Administrative Complaint, as matters of fact, and therefore request an informal proceeding.

____ YES ____ NO

(a) I desire to present oral testimony in mitigation or opposition.

____ YES ____ NO

(b) I desire to submit a written statement in mitigation or opposition.

____ YES ____ NO

(c) I desire to be present at the hearing.

____ YES ____ NO

3. The allegations set forth in the Administrative Complaint do contain disputed issues of material fact and I hereby request that this be considered a petition for formal hearing before a hearing officer appointed by the Division of Administrative Hearings.

BEST COPY AVAILABLE

Regardless of the options elected herein, I understand that I will be given adequate notice of the date set for hearing of my case.

_____
Signature of Respondent

STATE OF _____

COUNTY OF _____

I HEREBY CERTIFY that on this day, before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, personally appeared _____ to me known to be the person described in and who executed the foregoing instrument and acknowledged before me execution of same.

WITNESS my hand and official seal in the county and State aforesaid, this _____ day of _____, 1975.

_____
NOTARY PUBLIC
My commission expires:

APPENDIX B

IN THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA.

CASE NO.

MICHAEL DAPPOLONIA,

Petitioner,

vs.

BOARD OF CHIROPRACTIC EXAMINERS OF THE STATE OF FLORIDA,

Respondent.
_____/

PETITION FOR A WRIT OF CERTIORARI
TO THE BOARD OF CHIROPRACTIC EXAMINERS

TO THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA:

Petitioner, MICHAEL DAPPOLONIA, presents this, his petition for a writ of certiorari and states:

1. Petitioner seeks to have reviewed an order of the Board of Chiropractic Examiners of the State of Florida, said Order being dated the 15th day of July, 1976 and filed with the Secretary of State of the State of Florida on the 15th day of July, 1976.

2. This petition is presented under and pursuant to Article V, Section 4, of the Florida Constitution, and Rule 4.1 and 4.5c of the Florida Appellate Rules and Florida Statute Section 120.68 (1975).

3. This petition is accompanied by a certified copy of the Order which Petitioner seeks to have reviewed, a certified transcript of the proceedings of the Board of Chiropractic Examiners of the State of Florida held on Thursday, July 15, 1976 wherein the State Board adopted said final Order, a copy of a proposed recommended order including proposed findings of fact and requested conclusions of law which were submitted on behalf of the Petitioner in the course of the proceedings below, and a supporting brief.

4. The following are the facts of the case:

a. The Petitioner is and was at all times pertinent to this action a chiropractor licensed by the Florida State Board

of Chiropractic Examiners and holds license number 865. (Final Order - page 2; hereinafter references to the Final Order will be designated as F.O. followed by the page of the Final Order.)

b. The Petitioner is and was at all times pertinent to this action a naturopath licensed by the Florida State Board of Naturopathic Examiners and holds license number 548. (F.O. - 3)

c. During 1975 the Petitioner treated SUZANNE CARTER for fainting spells. Miss Carter was brought to the Petitioner by her mother. Petitioner's name was suggested to Miss Carter's mother by a friend. (F.O. - 2)

d. In treating Miss Carter the Petitioner used a diagnostic instrument known as a biometer, the purpose of which was to diagnose the condition of the patient. (F.O. - 2)

e. As part of the treatment of Miss Carter the Petitioner prescribed pills, known as Celoids. (F.O. - 2)

f. On September 2, 1975 the Respondent filed an administrative complaint against the Petitioner charging him with treating a patient by the use of a diagnostic instrument not taught in the regular course of instruction in a college recognized by the Board of Chiropractic Examiners, which constitutes fraud and deception in the practice of chiropractic and also charged the Petitioner with prescribing medication consisting of celoids, which also constituted fraud and deception in the practice of chiropractic. (F.O. - 1 and 2)

g. On January 26, 1976 a formal hearing was held under the provisions of Florida Statutes section 120.57 (1). Said hearing was before a hearing officer assigned by the Division of Administrative Hearings. (F.O. - 1 and 2)

h. During the course of said proceedings and in connection therewith the Petitioners, on or about February 16, 1976, filed a proposed recommended order which included proposed findings of fact and requested conclusions of law relative to the charges against Petitioner. (Hereinafter the proposed recommended order shall be referred to by the designation P.R.O., followed by the appropriate page number of said P.R.O.)

i. On April 16, 1976 the hearing officer issued a recommended order which concluded that the Petitioner was not guilty of prescribing medication as a chiropractor, but concluded that Petitioner was guilty of using as a chiropractor a diagnostic instrument not taught in regular course of instruction in a college recognized by the Board of Chiropractic Examiners which constitutes fraud and deception in the practice of chiropractic. (F.O. - 1, 4, and 5)

j. On Thursday, July 15, 1976 at Orlando City Hall, 400 South Orange Avenue, Orlando, Florida, the Board of Chiropractic Examiners of the State of Florida met in official session to take action on said recommended order. (Hereinafter references to the transcript of those proceedings will be made by the designation TR followed by the appropriate page number.)

k. The Respondent failed to provide the Petitioner with any notice of said meeting and the Petitioner learned of said meeting on the day said meeting was being held by way of an article in a local newspaper. (TR - 11)

l. Before allowing Petitioner's legal counsel to address the Respondent Board at said meeting, the Respondent voted not to delay the proceedings so as to allow the Petitioner an opportunity to prepare and appear before the Board concerning the consideration of the recommended order. (TR - 7 and 8)

m. After said vote, Petitioner's legal counsel was allowed to address the Respondent Board and formally request that the proceedings be continued until the next regularly scheduled meeting. (TR - 8 to 20)

n. Petitioner's legal counsel requested an opportunity to address the Respondent Board and present oral arguments to said Respondent Board concerning the Board's action on the recommended order. (TR - 21)

o. The Respondent Board denied Petitioner's legal counsel the opportunity to present oral arguments to the Respondent Board. (TR - 26)

p. The Respondent Board voted to adopt the recommended order of the hearing officer. (TR - 33 and 34; F.O. - 1)

5. The order of the Respondent Board revoking the Petitioner's license to practice the profession of chiropractic in the State of Florida departed from the essential requirements of law in the following particulars:

a. The Respondent Board failed to follow the procedures required by Florida Statutes Chapter 120 in that they did not allow Petitioner's legal counsel to present oral arguments and the final order failed to include rulings on each proposed finding of fact and requested conclusions of law.

b. There are no findings of fact that the Petitioner was acting as a chiropractor when using the diagnostic instrument.

c. The Respondent Board exceeded their authority in adopting said final order contrary to the provisions of Florida Statute section 460.24 and section 460.262.

d. It is impossible to use a diagnostic instrument not taught in the regular course of instruction in a college recognized by the Board of Chiropractic Examiners because the Board has not validly adopted any list of approved colleges.

WHEREFORE, Petitioner requests this Court to grant a writ of certiorai and enter its order quashing the decision and order hereby sought to be reviewed, and to grant such other and further relief as shall seem right and proper to the Court.

John W. Bowen of
ROWLAND, PETRUSKA, BOWEN & McDONALD
308 North Magnolia Avenue
Orlando, Florida 32801

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CAROL REILLY, ESQ., Assistant Attorney General, The Capitol, Tallahassee, Florida 32304, by mail, this 16th day of August, 1976.

/s/ Attorney

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

MICHAEL DAPPOLONIA,

Petitioner,

vs.

BOARD OF CHIROPRACTIC EXAMINERS OF THE STATE OF FLORIDA,

Respondent.

RECEIVED
JUN 9 1977
ATTORNEY GENERAL'S

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

PETITIONER, MICHAEL DAPPOLONIA, presents this, his Petition for a Writ of Certiorari and states:

1. Petitioner seeks to have reviewed an Order of the District Court of Appeal, Fourth District, dated and filed in the records of said District Court on the 7th day of April, 1977, the same being case number 76-1757 of said District Court. Said Order of the District Court became final upon the denial of a PETITION FOR REHEARING which denial occured on the 25th day of May, 1977.

2. This petition is presented under and pursuant to Article V, section 4 of the Florida Constitution, and Rule 4.5 c of the Florida Appellate Rules.

3. This petition is accompanied by the following conformed copies of those portions of the record as are necessary to show jurisdiction in this Court:

a. Petition for Writ of Certiorari to the Board of Chiropractic Examiners, filed with the District Court of Appeal, Fourth District of Florida, together with a copy of the Order of the Board of Chiropractic Examiners and a copy of a proposed recommended order including proposed findings of fact and requested conclusions of law which were submitted on behalf of the Petitioner in the Administrative proceedings. (The transcript of proceedings of the Administrative Board and Petitioner's brief filed with the Petition for Writ of Certiorari are not attached hereto as they are not necessary

for the determination of jurisdiction.)

b. Order from the District Court of Appeal, Fourth District, filed and dated April 7, 1977, denying the Petition for Writ of Certiorari.

c. The Order of the District Court indicating the date of denial of the Petition for Rehearing.

4. The following are the facts of the case:

a. The Petitioner filed a Petition for a Writ of Certiorari to the Board of Chiropractic Examiners before the District Court of Appeal, Fourth District, on the 16th day of August, 1976.

b. The Petition sought to have the District Court review an Order of the State Board of Chiropractic Examiners entered on the 15th day of July, 1976. Said Order adopted as its own Final Order the recommended Order of a Hearing Officer of the Division of Administrative Hearings of the Department of Administration of the State of Florida.

c. Prior to the submission of the recommended order of the Hearing Officer to the Board of Chiropratic Examiners, Petitioner submitted to said Hearing Officer a proposed recommended order which included proposed findings of fact and requested conclusions of law for the Hearing Officer to rule upon in the Hearing Officer's recommended Order submitted to the Board of Chiropractic Examiners.

d. Neither the recommended order of the Hearing Officer nor the Final Order of the Board of Chiropractic Examiners adopting said recommended order of the Hearing Officer contained any express rulings on each proposed finding of fact and proposed legal conclusions submitted by the Petitioner to the Hearing Officer as required by Section 120.59 (2), Florida Statutes (1975).

5. On the foregoing facts the District Court was presented with the following point of law:

That the Final Order of the Board of Chiropractic Examiners departed from the essential requirements of law by failing to follow the procedures required by Florida Statutes, Chapter 120, in that they did not include within said Final Order rulings on each proposed finding of fact and requested conclusion of law submitted by the Petitioner.

The District Court of Appeal, Fourth District, denied the Petition for Writ of Certiorari thereby necessarily ruling that the Board of Chiropractic Examiners had not departed from the statutory requirements by failing to include explicite rulings on each proposed finding of fact and conclusions of law submitted by the Petitioner.

6. The same point of law was involved in the case of Stuckey's of Eastman, Georgia v. Department of Transportation, decided by the District Court of Appeal, First District, on the 9th day of December, 1976. This decision was reported in 340 So. 2d page 119 and a copy of the decision is attached to this petition as Exhibit "1". The facts involved in Stuckey's v. Department of Transportation were as follows:

a. The Department of Transportation had rendered a final order against Stuckey's of Eastman, Georgia in proceedings that were subject to Florida Statutes Chapter 120, the Administrative Procedure Act.

b. The final order of the Department of Transportation adopted as its own the recommended order of the Hearing Officer of the Division of Administrative Hearings of the Department of Administration.

c. During the proceedings before the Hearing Officer, Stuckey's submitted to the Hearing Officer proposed factual findings and conclusions of law. The Hearing Officer's proposed order failed to include explicit rulings on each proposed finding of fact and conclusion of law as did the Department's order adopting the proposed order as its own.

d. On these facts, the District Court of Appeal, First District ruled as follows:

> The Department of Transportation departed from the essential requirements of law by failing to follow the procedures required by Florida Statutes, Chapter 120, in not including in its final order explicit rulings on each proposed finding of fact and conclusion of laws submitted by Stuckey's.

7. The decision of the District Court of Appeal, Fourth District, which Petitioner seeks to have reviewed is in direct conflict with the above mentioned decision of the District Court of Appeal, First District. Because of the reasons and authorities to be set forth in Petitioner's brief, it is believed that the decision hereby sought to be reviewed is erroneous and that the conflicting decision of the District Court of Appeal, First District, is correct and should be approved by this Court as the controlling law for the State of Florida.

WHEREFORE, Petitioner requests this Court to grant a Writ of Certiorari to review the decision of the District Court of Appeal, Fourth District, and thereafter enter its Order quashing the decision and Order hereby sought to be reviewed, approving the decision of the District Court of Appeal, First District, as the correct decision and granting such other and further relief as shall seem right and proper to the Court.

John W. Bowen, Esquire,
ROWLAND, PETRUSKA, BOWEN & McDONALD
308 North Magnolia Avenue
P. O. Box 305
Orlando, Florida 32802

Attorney for the Petitioner

CERTIFICATE OF SERVICE

I DO CERTIFY that copies hereof have been furnished to ROBERT L. SHEVIN, Attorney General, and Carol L. Reilly, Assistant Attorney General, Tallahassee, Florida, Attorneys for Respondent, BOARD OF CHIROPRACTIC EXAMINERS OF THE STATE OF FLORIDA, by hand delivery this 9th day of June, 1977.

John W. Bowen

APPENDIX D

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 76-1757

MICHAEL DAPPOLONIA,

Petitioner,

vs.

BOARD OF CHIROPRACTIC
EXAMINERS OF THE STATE
OF FLORIDA,

Respondent.

PETITION FOR RE-HEARING

THE PETITIONER, MICHAEL DAPPOLONIA, by and through its undersigned attorneys, petitions this Court for a re-hearing in this cause based upon the following ground:

1. The Court's per curiam denial of the Petitioner's Writ of Certiorari was a ruling against the Petitioner on all points which Petitioner presented for review. One of the points presented for review was that the Final Order adopted by the Respondent Board failed to comply with the Administrative Procedures Act by not including a ruling upon each proposed finding of facts submitted by the Petitioner and by not including a brief statement of the grounds for denying the requested specific conclusion of law submitted by the Petitioner. This argument was presented in Point II of Petitioner's Brief. Points III, IV, and V are related to the deficiencies in the Final Order in that the Final Order should have addressed these points as they were presented to the Hearing Officer by way of the proposed Order submitted by the Petitioner to the Hearing Officer.

POINT II of the Respondent's Brief replies to the Petitioner's claim that the Final Order did not conform to the Administrative Procedures Act. In that point the Respondent argues that the Final Order was not required to rule explicitly on any proposed findings of fact or conclusions of law submitted by the Petitioner to the

CONSIDERED AND DENIED
5/25/77 ETC
EMMETT J. CONSKEY, CLERK
4th DISTRICT COURT OF APPEAL

Hearing Officer. The Respondent Board argues on pages 10 and 11 of Respondent's Brief that the failure to file exceptions to the Hearing Officer's recommended Order constitutes a bar against the Petitioner complaining about the Final Order adopted by the agency.

The First District Court of Appeals has recently ruled on precisely the issue presented by Point II in Petitioner's Brief and on the defenses to that issue presented by the Respondent as set forth above. That case is Stuckey's of Eastman, Georgia v. Department of Transportation, 340 So. 2nd 119 (Fla. 1st DCA, 1976) which was decided and published after Briefs were submitted but before the Final Order came down in the present case. In the Stuckey's case, the Petitioner had submitted to the Hearing Officer proposed factual findings supporting conclusions of law upon which the Petitioner was going to rely. The proposed Order did not contain the specific rulings on said proposed findings of fact or conclusions of law. Stuckey's did not file any exceptions to the proposed Order with the State agency involved and the final agency Order adopted the recommended Order as its own Final Order. The Court ruled that the failure of the agency to rule explicitly on the issues presented by the Petitioner denied the Petitioner of the rights secured by the Administrative Procedures Act,

> "...namely, the right to raise pertinent factual issues for administrative determination, to submit proposed findings on those issues, to receive an explicit ruling on the matters thus submitted and to preserve them for Judicial review."

The agency had claimed that the failure to file exceptions barred the Petitioner from raising the issue with respect to the Final Order. The Court specifically rejected that argument.

If this Court's per curiam denial of the Petition for Writ Certiorari stands, it would be in direct conflict with the opinion and ruling of the First District Court of Appeal in the Stuckey's case cited above. The Petitioner respectfully requests that the Court reconsider its denial of the Petition for Writ of Certiorari and Order that the Final Order of the Respondent Board be vacated and the cause remanded to the Respondent for rulings, after recommendations have been made by a Hearing Officer, on the proposed findings are fact and conclusions of law which were submitted by the Petitioner before the Hearing Officer.

Respectfully submitted,

John D. Bowen of
BOWLES, PETRUSKA, BOWEN & McDONALD, P.A.
308 North Magnolia Avenue
P. O. Box 305
Orlando, Florida 32801

Attorneys for Plaintiff
phone #305/841-8170

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by mail to Robert L. Shevin, Attorney General, and Carol L. Reilly, Assistant Attorney General, 725 South Calhoun Street, Bloxham Building, Room 103, Tallahassee, Florida, 32304, this 22 day of April, 1977.

John D. Bowen
Attorney at Law

Supreme Court, U. S.
FILED
MAR 15 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1977

No. 77-883

MICHAEL DAPPOLONIA,

Appellant,

vs.

BOARD OF CHIROPRACTIC EXAMINERS OF THE STATE OF FLORIDA,

Appellees.

APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

PETITION FOR REHEARING

J. MICHAEL CARTER
Post Office Box 566
Crawfordville, Florida 32327
Counsel of Record for Appellant

INDEX

	PAGE
QUESTION PRESENTED.....	2
GROUNDS FOR PETITION FOR REHEARING.....	2
CONCLUSION.....	6
APPENDICES.....	8
A. TRANSCRIPT OF REVOCATION HEARING	8

INDEX OF AUTHORITIES

CASE	PAGE
Buckman v. State Board of Accountancy, 300 So3d 671 (1974)	4
Smith v. Department of Registration and Education, 412 Ill. 332, 106 NE2d 722	4
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 416	4
ICC v. J - T Transport Company, 368 U.S. 81	6

STATUTES

The Florida Statutes Annotated Administrative Proceedings Act 120.53 (1)(d)	2
The Florida Statutes Annotated Administrative Proceedings Act 120.54(1) and (1)(a)	2 2

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1977

No. 77-883

MICHAEL DAPPOLONIA,

Appellant,

vs.

BOARD OF CHIROPRACTIC EXAMINERS
OF THE STATE OF FLORIDA,

Appellees.

PETITION FOR REHEARING

Pursuant to Rule 58(1) of the Supreme Court of the United States, Appellant, Michael Dappolonia, files this Petition for Rehearing of this case and to reconsider and set aside the Order dismissing this appeal entered on February 21, 1978, on the following substantial grounds available to the petitioner, although not previously presented.

QUESTION PRESENTED

Whether Dr. Michael Dappolonia was deprived of his Chiropractor's license without due process and equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution when the Appellee revoked the Appellant's license without giving the Appellant notice of the time and place of the Revocation Hearing, and denying the Appellant's counsel an opportunity to be heard at the Revocation Hearing.

GROUNDS FOR PETITION FOR REHEARING

As grounds for this Petition for Rehearing, the Appellant attaches Appendix A and calls the Court's attention to pages one (1) through eight (8) which clearly show that the Appellee revoked the Appellant's license without giving him notice of the Revocation Hearing. The Florida Statutes Annotated Administrative Proceedings Act 120.53(1)(d) states in part as follows: "... In addition, each agency shall give notice of meetings, hearings and workshops in the same manner as that prescribed for rulemaking in Subsection 120.54(1),...The notice shall include a statement of the general subject matter to be considered and shall be given not less than 7 days before the event." Further, Florida Statutes Annotated Administrative Procedures Act 120.54(1)(a) states as follows: "...Except as otherwise provided in this paragraph, the notice shall be mailed to the committee, to all persons named in the proposed rule, and to all persons who have made requests of the agency for advance notice of its proceedings at least 14 days prior to

such mailing. The agency shall also give notice as is prescribed by rule to those particular classes of persons to whom the intended action is directed..."

Clearly from reading the transcript of the Revocation Hearing, Appendix A, page 2, lines 3 through 16 show that the Appellee conducted the Hearing under the mistaken assumption that the law did not require notice to the Appellant. The above-quoted language of the Administrative Procedures Act states that "The notice shall be mailed to...all persons named in the proposed rule ..." and then continues the language with a conjunctive "and", not a disjunctive "or". The Appellant did not have to carry the burden of making a request that he be notified of the Revocation Hearing, as was prescribed by the Appellee at the Hearing.

Further, when the Appellant's attorney, Mr. Bowen, asked the Appellee, "Could I address the Board concerning the recommended Order", see Appendix A, page 21, lines 3 and 4, the Appellee discussed the matter in pages 21 through 26 and voted to deny Mr. Bowen's request, see specifically Appendix A, page 26, lines 8 through 15.

These two votes of the Appellee, (1) To proceed with the Revocation Hearing without having given notice to the Appellant, and (2) To deny the Appellant's counsel to discuss the merits of the proposed revocation of the Appellant's license, were two substantial and fundamental constitutional violations by the Appellee and clearly demonstrated the arbitrary and capricious manner in which the Appellant's license was revoked in the Hearing.

As previously stated in the Appellant's jurisdictional statement, there is an important Florida case on point, namely, the case of Buchman v. State Board of Accountancy, 300 So3d 671 (1974) which held that "Statutes permitting revocation of occupational licenses are penal in nature", and on page 673 of this same decision followed this statement and, citing from another case, said "...The rule is that, where Statutes of this kind are invoked, the provisions of the Statutes must be strictly followed, because the Statute, as hereinbefore stated, is penal in its nature". Further on in this decision on page 674, the Court reinforced this proposition of law, saying "Earlier we stated that when rights of life, liberty or property are materially affected by the exercise of official administration discretion, due process of law must be offered to the proceedings". Also see Smith v. Department of Registration and Education, 412 Ill. 332, 106 NE2d 722 as typical statements of law in that "So serious a proceeding as to revoke the license of a doctor, due process requires a definite charge, adequate notice, and a full, fair and impartial hearing".

The very essence of the Florida Administrative Procedures Act is to provide affected parties with an opportunity to respond to rules or orders that affect their substantial interest. Omitted from our previous jurisdictional statement was the weighty point of whether the "Agency decision was based on a consideration of relevant factors in the case and whether there had been a clear error of judgment", see the case of Citizens to Preserve Overton Park v. Volpe, 401 U.S.416. The Court cited the well-known authority on administrative law, Professor L. Jaffe, with reference to his statement on "Abusive discretion", stating as follows: "...Broadly stated, an abuse of discretion is an exercise of discretion in which a relevant consideration has been given an exaggerated and unreasonable weight, at the expense of others. The 'letter' has been observed; the 'spirit' has been violated. Discretion implies a 'balancing'. Where the result is eccentric, either there has not been a 'balancing'; or a hidden and maybe an improper motive has been at work."

Our situation parallels Professor Jaffe's description. Here the alleged use of a machine which is used only in the process of diagnosis, e.g., checking a patient's level of vitality; a machine applying electronics to the most ancient methods of diagnosis and one used successfully by the Appellant with hundreds of patients for many years; a machine which the complaint against the Appellant does not even allege ever resulted in harm to anyone - for this, the Appellant is to be deprived of his license to practice his profession and is to lose the good reputation and massive patient approval he has built up in twenty-two years of practice. The Naturopathic school of the healing art approves of the machine and it is under the license to practice naturopathy that the Appellant used the machine. But even if he were guilty of using this machine, unauthorized by schools of chiropractic, as was found by the Hearing Examiner, is there evidence here that there has been a "balancing" of the factors involved? Would not discretion suggest a far less drastic discipline than revocation of his license?

Another factor is the welfare of hundreds of patients that look to the Appellant for health care. The Appellant operates Napier Clinic, which is probably the largest chiro-

practic clinic in the city of Orlando, Florida. It is certainly the largest such clinic served by a single doctor. Utmost discretion is important in weighing a proposal to disrupt a relationship like this. Here certainly there is a demand that: "...The agency must make findings that support its decision, and those findings must be supported by substantial evidence. (ICC v. J - T Transport Company, 368 U.S. 81)

With adequate notice and opportunity to be heard, every material statement promulgated by the Examiner could have been disproved, had there been a Hearing on his recommended Order.

CONCLUSION

For the reasons herein stated, it is respectfully suggested that the Court vacate the Order dismissing the Appeal of this Appellant and restore the case to the calendar for argument.

Dated this 13th day of March, 1978.

J. Michael Carter
Post Office Box 566
Crawfordville, Florida 32327
(904)926-3647

CERTIFICATE OF COUNSEL

TO: Robert Shevin, Florida Attorney General and Charles J. Ruberg, Assistant Attorney General

I, J. Michael Carter, attorney for the Appellant, Michael Dappolonia, certify that the foregoing petition is presented in good faith and not for delay.

Dated this 13th day of March, 1978.

J. Michael Carter
Post Office Box 566
Crawfordville, Florida 32327
Attorney for Appellant

CERTIFICATE OF SERVICE

I, J. Michael Carter, a member of the Bar of the Supreme Court of the United States, and as counsel for the Appelant herein, hereby certify that I have this day served three (3) printed copies of the foregoing Petition for Rehearing and appendices thereto on the Appellee herein, by depositing same in a United States Post Office with first class postage prepaid addressed to counsel of record for the Appellee, as follows: Robert Shevin, Florida Attorney General and Charles S. Ruberg, Assistant Attorney General, Department of Legal Affairs, Office of Attorney General, the Capital, Tallahassee, Florida, 32304, this 14th day of March, 1978.

J. Michael Carter
Attorney for Appellant

STATE OF FLORIDA, DIVISION OF PROFESSIONS, DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATIONS, FLORIDA STATE BOARD OF CHIROPRACTIC EXAMINERS

IN RE: The Revocation of the License of Michael Dappolonia

Meeting of the Florida State Board of Chiropractic Examiners, held on THURSDAY, JULY 15, 1976, at City Hall, 400 South Orange Avenue, Orlando, Florida.

Board of Chiropractic Examiners
6501 Arlington Expressway Building
Suite 202
Jacksonville, Florida 32211

BOARD MEMBERS:

JACK HENDRICKS, D.C., Vice President

PAUL VOGEL, D.C., Secretary-Treasurer

C. M. HARTLEY, Coordinator

STANLEY S. KAPLAN, D.C.

WALTER AIKEN, D.C.

RONALD L. HARRIS, D.C.

CAROL REILLY, Assistant Attorney General

* * * * * * *

JOHN W. BOWEN, ESQ., of Rowland and Petruska, 308 North Magnolia, Orlando, Florida, for Dr. Dappolonia.

ANK SARLI CSR

P R O C E E D I N G S

(The following proceedings dealt with Dr. Dappolonia:)

MS. REILLY: He spoke to me prior to the board's meeting. I think before I would review the hearing officer's recommended order with y u, I'd like to tell you that Mr. Bowen feels that he should have had notice of this meeting and that he should have had an opportunity to address the board.

It's my position that the law and the rules under which the board operates puts the burden on him to come forward and request an opportunity and that he did not do so and that we are not required to give him notice.

If the board wishes to at this time, they could delay the consideration of this order and give Mr. Bowen an opportunity to present exceptions on the order and to prepare statements. We could not do that today because the board's prosecuting counsel is not here. And, of course, the board's prosecuting counsel has had no notice either. He

is in exactly the same position as Mr. Bowen is.

However, as your legal advisor, we have operated in the past, as you know, and it's my feeling that we are operating correctly, if the party whose license is under question does not request further appearances before the board, the board is under no obligation to hunt up that party and drag them in. So I think the first issue would be simply whether or not we want -- I think you all have been copies of the recommended order. I think the first decision to make would be whether or not we want to continue this proceeding until some later date to give Dr. Dappolonia and his attorney a chance to prepare a presentation to the board. If not, then he would like to enter an objection for the record so that he would have remedy in a court later at some point if he chose.

Then once we have decided that, if you would, I can go ahead and review

BEST COPY AVAILABLE

the recommended order.

DR. HENDRICKS: Point of information, when was the board presented that information?

MS. REILLY: The recommended order was issued by the hearing officer on April 16.

MR. HARTLEY: Received in our office on April 26th.

MS. REILLY: Right. And at our meeting the 28th. I believe at that time we distributed copies. We may not have had a copy for every board member.

DR. HENDRICKS: One was the 28th.

MS. REILLY: The April 28th meeting.

MR. HARTLEY: For the record, sir, it was determined at that time that the respondent's time to file exceptions had not concluded and therefore, the board would defer the matter to this meeting.

DR. HENDRICKS: Point I wanted to bring out, it's already been before the board and was deferred because, what, ten day time had not lapsed. Which is the time Carol Reilly is referring to for benefit of the new board member. So we did defer to allow the counsel representing

Dr. Dappolonia to petition the board for such a presentation. In the absence of that petition or request, we are here today to consider the matter for determination, as I understand it. That's what's just been presented.

The question now before the board is, as counsel just stated, is whether or not the board wishes to deviate from its agenda and grant Mr. Bowen an opportunity to present his remarks.

Now, we have that option, correct, Ms. Reilly?

MS. REILLY: What we would have to do is to defer consideration of this matter until the next meeting.

DR. HENDRICKS: Not hear Mr. Bowen either?

MS. REILLY: Not really.

MR. BOWEN: On the merits?

MS. REILLY: That's right. Not on the merits. We would want the board's prosecuting counsel to have an opportunity also to prepare, because you see, I cannot really advise you and oppose Mr. Bowen at the same time.

DR. HENDRICKS: Any members of the board have a question on the procedure before us at the moment? Could I ask then for the board's pleasure? Is a motion in order?

MS. REILLY: I think it would be.

DR. VOGEL: Just one point of discussion?

DR. HENDRICKS: That is why I asked were there any other questions.

DR. VOGEL: I believe this was quite clear there was ample opportunity to file exception to the hearing officer on this, and as Ms. Reilly pointed out, it's not within the province of this board to seek out the counsel representing the defendant in the matter.

I think we ought to go along with the recommended order since the attorney's going to be filing.

MS. REILLY: You are making, if I might comment, you are saying that we should not defer consideration beyond today for the purpose of hearing any other arguments by counsel?

DR. VOGEL: Yes, ma'am.

MR. BOWEN: Could I have an opportunity to

comment on the procedure?

DR. HENDRICKS: Not at the moment. You will, perhaps. But right now I want to hear, I want to be sure my board understands what's going on. Any other questions on procedure? Okay, what is the board's pleasure?

MR. HARTLEY: For the purpose of the record, the motion is not to grant a continuance of this matter.

DR. HENDRICKS: If a motion is to be made, it would be that motion. In absence of such a motion.

MR. HARTLEY: I thought he made one.

DR. VOGEL: I move that we deny granting the continuance at this time.

DR. KAPLAN: I second the motion.

DR. HENDRICKS: I don't know why the motion is in order since there has been no real request, unless you are making request on behalf of counsel.

DR. VOGEL: No, you are.

MS. REILLY: I thought I was asking the board to consider whether or not they would deviate from --

DR. HENDRICKS: Through you. So now you have so moved to deny the request?

DR. KAPLAN: I second it.

DR. HENDRICKS: There is a second. Any second on the motion? All in favor "aye."

(All members so respond.)

DR. HENDRICKS: All oppose, same sign.

MS. REILLY: I think that Mr. Bowen's under the impression that he has a righ. to participate in that part of the discussion.

DR. HENDRICKS: Was I correct in my procedure?

MS. REILLY: I think so.

DR. HENDRICKS: Now, if we want to hear any comments, we may. What I mean is, comments, that's what I want to know.

MR. HARTLEY: He could have spoken on the question, you could have heard him before you voted.

MS. REILLY: I think that maybe I have caused some confusion. I think the alternatives that were before the board were whether or not they would deviate from the agenda as it's set now. And put the consideration of the recommended order off until the next meeting.

DR. HENDRICKS: Could we not now hear him now during the discussion of the action we are going to take?

DR. VOGEL: We already took the action.

MS. REILLY: I think we have already said he could not speak. The other alternative would be then to decide that he could not speak and that, allow him to enter an objection for the record. I think the board acted correctly. I don't think he has a right to participate in the board's deliberations as to whether or not they would hear him.

DR. HENDRICKS: I asked the board if they had a clear understanding of the procedure, and they indicated they did, and so voted.

DR. VOGEL: You were correct, Mr. Chairman.

DR. HENDRICKS: We will now ask the attorney of the board to present the order to the board.

MS. REILLY: Let's allow Mr. Bowen to make his objection now.

DR. HENDRICKS: If you will, Mr. Bowen.

MR. BOWEN: What we have, I think, is a

disagreement on legal opinion between Ms. Reilly and myself concerning the interpretation of administrative procedures act and the model rules under which you proceed. For the record, I'd like to state that I was never notified by the agency nor was my client notified by the agency, the agency being the Board of Chiropractic Examiners, about the proposed order which would trigger the time period running, which would tell me that I have 15 days within which to file exceptions to the order and request oral arguments.

MS. REILLY: You did receive that notice from the hearing officer.

MR. BOWEN: After reviewing what you have there and my file this morning, it came back to me that what I was waiting for was for notification from the agency. The hearing officer sent me a copy of his proposed order, and the way I interpret the difficult provision that we have there, which I think your attorney will advise you there is a

typographical error in the regulations of the state department, that could throw one off.

But, nevertheless, my interpretation was that I was waiting for transmittal from the Board of Chiropractic Examiners, a copy of the proposed order from the hearing officer, which I interpreted as triggering the 15 days within which to file the exceptions and request for oral arguments.

The first that I heard of any action by the board was in this morning's Orlando Sentinel, in an article that was written on a related matter concerning my client. And it mentioned in passing in there, in the article, that the meeting was to be held at 10:00 a.m. this morning to consider this matter.

I see, and would like to state in the record that that article, I am sure, has been read by everybody here, at least one board member was reading it this morning here at the meeting. Which

is another reason I would like a chance to address the board on this because the article is extraneous to the charges before the board considered today, and I think the article is rather inflammatory and might cause prejudice against my client in the board considering unrelated charges to the news article that appeared in the paper this morning.

What I would like to do for the record, which I requested informally through your counsel, and have already had a motion on that, I would like to request that the board delay action on this matter so that I would have an opportunity to appear and present oral arguments with your counsel that represented you at the hearing before the hearing officer to be there and have the equal opportunity to present his side also.

At a later meeting, at the next meeting that would allow me time to make a presentation on the merits and let's

talk about the merits because there are some serious problems with the proposed order that I have been waiting to address to this board for their ruling on this. I think nothing would be hurt by delaying and we'd request this board to take action to delay in view of the ambiguity of the regulation.

I can understand it might not be unclear to Ms. Reilly, but it wasn't unclear to me as to proper procedure, and both of us interpreted it an entirely different way, which happens with lawyers all the time.

And, in view of that, I would request of the board to grant a continuance on this until its next meeting, wherever the meeting is -- not requesting it be here -- but we would be able to appear and present pertinent data to the board for your consideration in making your decision concerning the proposed order. And would make that request that we do be allowed that time. Right now the time I have had to prepare

is read the paper and come down here, and when I called my client at 9:40, he had not read the morning paper and didn't even know about the hearing himself.

And I would think that it wouldn't hurt to let us have notice of when the meetings are going to be and provide us with notice we are on the agenda. That would have been the minimum notice that would have provided us an opportunity to appear. I don't think anything would be hurt by delaying. We'd request the board reconsider its motion that was made prior to my request for continuance.

DR. HENDRICKS: Let's have our counsel respond.

MS. REILLY: This is an awkward position because I am your legal advisor and I am not -- it's not my desire to get into an adversary position. But I would like to point out that under the administrative procedures act and the law there, the proposed order which Mr. Bowen thinks he has a right to receive from the board is defined as the same thing as the

recommended order which is delivered by the hearing officer.

The notice you have received, and I would like the board to understand this clearly, is exactly the same notice that anyone else in your position has received. There would be in the absence of your request to provide briefs or exceptions or oral arguments, there would be no reason to put you on notice that this matter was on the agenda because the board would not have its prosecuting counsel here. There would be no argumentative proceedings taking place.

However, as you say, there is no harm in waiting, possibly. We know that the hearing officer has recommended revocation of Dr. Dappolonia's license for using instruments that are not, whose use is not taught in chiropractic colleges. So there may be no harm in waiting, there may be harm in waiting. The administrative procedures act is a boondoggle. It's only been in existence

for two years. I work with it every day. Some other lawyers don't. A lot of people have different ideas about what it means. Theoretically, courts should decide what it means. But perhaps if a man's livelihood is in question, maybe we could agree at this point that Dr. Dappolonia would not use the instruments in question between now and such time as the board meets again and you have an opportunity to present these arguments. I think that would be a fair trade. And that would be my proposal.

MR. BOWEN: I don't have the authority to agree on that with my client, but I would strongly recommend it and urge that he would -- I will agree as his counsel that that would be agreeable and if it's not agreeable with him, I would contact you and, of course, the alternative would be that the board action would -- I don't think he would object to going along with that recommendation.

MR. HARTLEY: Why don't we, if that's a question, I think the board should take a few

minutes' recess and let him contact his client to see if it's acceptable.

DR. HENDRICKS: That is if the board wants to do -- .

MR. BOWEN: If I might say one thing concerning what Ms. Reilly said, I can agree with her on the administrative procedures act because I, too, represent a major governmental unit that is bound by the administrative procedures act, and I can understand the differences in interpretation concerning specific provisions of the act and the model rules themselves.

DR. HENDRICKS: I'd like, if I may, have the board discuss the recommendation Ms. Reilly has made.

DR. VOGEL: Very important issue here, Mr. Chairman, that while this board sits as a board of chiropractic examiners, we do not sit as a board of naturopathy examiners. We have an individual here who is a dual licensee. You can commit him and we can, should we decide to change our position, you can commit your

client to chiropractic restrictions; certainly we have no authority in the area of naturopathy. And this presents a problem to this board because anything that this man does wrong as a naturopath reflects on the chiropractic profession and certainly our interests as the chiropractic profession, but more so the people that chiropractic serves.

And being, the fact that this man is a dual licensee alone, I would make recommendation to my board that we stick to the decision we have just held because the man certainly can continue practicing as a naturopath. We have no control over that. I wouldn't want any more problems to occur to this board as a governing body in the area of chiropractic. So I feel that we would be performing our function in protecting the public by not reconsidering our decision.

DR. HENDRICKS: By proceeding with the order?

DR. VOGEL: Proceeding definitely with this order. It's imperative, I think.

DR. HENDRICKS: Have any other comments?

DR. KAPLAN: The attorney mentioned we read that article. That article appeared today. That has no bearing whatsoever on the decision that was made by the adminis rative hearing, which was a few m nths ago, I believe.

MR. BOWEN: Right. That is true.

DR. KAPLAN: So this could not affect anything we say whatsoever excep for the fact whether it's a stay or it being granted. The administrative hearing officer laid down the rules for revocation prior to that article, so that would not have affected any decision that we could have made or they could have made.

MR. BOWEN: That decision is by the hearing officer's recommended order and not binding on the board. And the board takes final action is what I was saying.

DR. HENDRICKS: That's a separate matter. That does not in any way have to do with this particular case. Any other comments by the board?

DR. KAPLAN: One other thing. Was this meeting,

this is a public meeting?

MS. REILLY: This meeting today?

DR. KAPLAN: It has been advertised.

MS. REILLY: Yes. There is one other point I should make. By law, we are required to issue our final order within 90 days of the hearing officer's recommended order, so we should keep that in mind, and if the board were of mind to delay, we'd have to agree to delay that also.

DR. HENDRICKS: It would appear to the chair that the board has proceeded in due course as at least our counsel interprets the administrative procedures act, and I would therefore ask that the attorney do present to the board at this time the recommended order in light of the board's immediate past decision.

DR. VOGEL: I second the motion.

DR. HENDRICKS: We have already moved that we are going to proceed. Has been no motion to reconsider, but I will, out of fairness, ask, is there a move to reconsider on the board? If there is, I will entertain it at this time. If

not, Ms. Reilly, you present the recommended order to the board.

MR. BOWEN: Could I address the board concerning the recommended order?

MS. REILLY: I think that's what the discussion was about. Our counsel is not here.

MR. BOWEN: Could I ask for a ruling from the board just for the record, because I'd like to request to address the board concerning important matters and deficiencies I feel exist in the recommended order and would like an opportunity to point these out to the board. Before they consider the final action, agency action on the recommended order.

MS. REILLY: He just wants to get this into the record.

DR. HENDRICKS: That was your objection.

MR. BOWEN: I would object to the board proceeding without giving me an opportunity to, since I am here, to speak on this, although I haven't had time to prepare.

DR. HENDRICKS: I believe that is what the

board understood and acted on.

..OWEN: The board was acting on a request for a continuance of this so I could appear at the later one. Now I am requesting an opportunity to address the board concerning the recommended order before the board now that you will be considering.

..DRICKS: Thank you for that clarification.

..EL: We deny --

..DRICKS: (Interposing) It is so noted, correct, by the secretary that this request has been made of Mr. Bowen. Mr. Hartley, do you have any need for clarification of this request? All right, Ms. Reilly, do we need a motion on that?

..LLY: Yes, why don't you have a motion.

..DRICKS: May I have a motion regarding Mr. Bowen's request at this time?

..EL: I move that we deny the request of Mr. Bowen.

..DRICKS: Is there a second? If not, it dies for lack of a second.

..EL: Does the board fully understand -- they just voted something a moment ago.

I don't know if they understand what's happening.

DR. HENDRICKS: Did the board understand the motion Dr. Vogel made? Just now? Denying Mr. Bowen's request?

DR. VOGEL: He, excuse me, he should have filed exceptions. He did not file exceptions. Do you understand? Does the board fully understand what Ms. Reilly might explain? He had to file exceptions under the law. He did not file exceptions. Right now, he wants to talk about exceptions. It's irregular. You already voted him past one point. Now we are just moving further in a proper direction to deny any further reading of this because we are trying to go into the final order that Ms. Reilly would be reading.

DR. AIKEN: Aren't we saying by not going ahead on our motion, that we'd like to hear what he has to say?

MS. REILLY: No.

MR. BOWEN: That is what I thought.

MS. REILLY: I believe that your motion was to

deny Mr. Bowen's request; his request was to address the board at this time as to the merits of the recommended order. The substance of the recommended order. Mr. Vogel's motion would deny him.

DR. HENDRICKS: And therefore, with no second, we would proceed in allowing Mr. Bowen --

MS. REILLY: (Interposing) I am sorry, yes.

DR. VOGEL: That would be tantamount to allowing him to go ahead with the exceptions which he did not file. I hope you understand that you are actually ruling against something you voted on a few minutes earlier.

DR. HENDRICKS: That was exactly what I was trying to explain before.

MR. BOWEN: The other motion, if I might clarify it --

DR. HENDRICKS: (Interposing) What are you clarifying?

MR. BOWEN: Clarifying my request and motion, I would like just an opportunity to maybe give this clarification that might help you proceed.

The first request was to delay

the proceedings so th.: I would have an opportunity to appear in the future.

DR. HENDRICKS: You have done that.

MR. BOWEN: Right, and that was denied. The second request was an opportunity to speak to the board now concerning the merits of this --

DR. VOGEL: (Interposing) Not the merits of this, sir. You are talking about the merits of the recommended order by the hearing officer.

MR. BOWEN: Right.

DR. HENDRICKS: That's the difference in the two motions.

MR. BOWEN: Is to allow me to speak today on these things and all I am requesting is that opportunity to address you today on that and the motion was made to deny that.

DR. HENDRICKS: This motion doesn't accomplish the same thing the earlier motion would have. In delaying, you would have had an opportunity. So now that you haven't delayed. Dr. Vogel was trying to make sure the board understood it. He is

looking for the same clarification you are. So in effect, both of your motions are attempting to bring before the board either at a future meeting, which failed, or at this meeting, the same argument. The board understand that now? Is there a motion regarding the request?

DR. KAPLAN: Mr. Chairman, I move to deny the request.

DR. HARRIS: Second.

DR. HENDRICKS: Is there any discussion? All in favor, aye.

(All members so respond.)

DR. HENDRICKS: All opposed, same sign. Carried.

MR. BOWEN: For the purposes of my record here, am I to understand tha. I am not going to be allowed to address the board concerning the board's action on the recommended order for Dr. Dappolonia?

MS. REILLY: That's my understanding.

DR. HENDRICKS: That's my understanding and counsel agrees.

MS. REILLY: I see no reason for a court reporter to also transcribe the

proceedings. I would object to the introduction of these verbatim discussions in a court later.

MR. BOWEN: Is it the board's decision to say that I cannot have a court reporter here to record these proceedings for my own benefit, as a member of the public and as attorney of record for Dr. Dappolonia? And this I would express a strong objection and recommend that here we are getting into just a complete denial of due process. And this just offends the basic notions of due process as well as government in the Sunshine Law, and I would urge the board to strongly consider this before taking any action that would eliminate me from this meeting with my court reporter.

DR. HENDRICKS: Ms. Reilly, is there anything in the statutes that allows the board the right to deny public transcript?

MS. REILLY: Well, the board's recording of the meeting is the public record of the meeting.

DR. HENDRICKS: Is there anything that would

permit us to deny anyone from the public to come in and transcribe? We have a gentleman out there.

MS. REILLY: No, there really is not. I am wishing, mostly I wish to put Mr. Bowen on notice that I would object to the introduction of such a transcript in a court of law. It's not the record of the public meeting. It would be for his use solely.

DR. HENDRICKS: If it's my prerogative and with the board's permission, I would rule that the transcript may continue. With your objection noted.

MS. REILLY: Fine.

DR. HENDRICKS: Do you have that objection?

DR. VOGEL: It's being recorded. Mr. Hartley is up on everything.

MR. HARTLEY: If I may speak for myself, I am not. Ms. Reilly, you are objecting to the court reporter's transcription?

DR. VOGEL: For purpose of future court use.

MS. REILLY: That's my objection.

DR. HENDRICKS: We are only waiting now for Mr. Hartley to say he is caught up.

DR. VOGEL: I move we allow our legal advisor to read the --

DR. HENDRICKS: (Interposing) I don't think the motion is in order. I think we have already agendaed it and we have taken care of the necessary motion. I think now it's a matter of her proceeding. I asked her to wait until Mr. Hartley is with us. Now. Okay.

MS. REILLY: I would pass down for each of you, two of you can share a copy of the recommended order. And I will share mine with Dr. Vogel.

This is the recommended order which was delivered to the board by Ken Ayers, a hearing officer to the Division of Administrative Hearings. This is a recommended order which the board is required to take final action on this recommended order within 90 days from April 16. That is today, if a quick computation tells me. The recommended order states that by administrative complaint filed September 2nd, 1975, this board sought

to revoke the license of Dr. Michael Dappolonia, alleged that he had treated the patient by use of a diagnostic instrument not taught in the regular course of instruction in a college recognized by the Board of Chiropractic Examiners.

Also, the allegation is presented he presented medication consisting of celloids. And that he used a diagnostic instrument which was incapable of doing what he represented it to do. And therefore, he was guilty of fraud and deception in the practice of chiropractic. Which is a violation of Chapter 46013 -- what is it? 133E. It was also alleged that the chiropractor prescribed pills, the celloids, and that that was also fraud and deception of the practice of chiropractic.

The hearing officer then proceeds to discuss the, to present his findings of fact, basically, the daughter of one Carol Ann Carter, a Susan Carter had had several episodes in school where she

had passed out and routine medical exams had failed to disclose any particular, any problem. However, Mrs. Carter thought she was passing out because of a pinched nerve. Susan was taken to Dr. Dappolonia as a patient upon the recommendation of a friend of the Carters. I would suggest that I can hit the highlights of this order, but I would suggest that what would be the best procedure to follow would be for us just to sit here and take the opportunity to read it once again. I know you have all seen it and read it before.

DR. HENDRICKS: All right, the board take just a few minutes without a recess and familiarize themselves with the balance of the order.

Anyone need more time? All right. The board has concluded its reading of the recommended order. Any further comments, Ms. Counsel?

MS. REILLY: If the board members have questions, I will be glad to address

them.

As you know, the hearing officer is the fact finder in this matter. We do not have the authority to change his findings of fact without going back to the original record of the proceeding.

However, we do have the authority to revise his conclusions of law since under the law, the board members, the board itself is the appropriate body to interpret the law which it administers.

We also have the authority to reduce the penalty which the hearing officer has recommended, but not to increase it. He has determined by his findings of fact and drawn the conclusion that Dr. Dappolonia is guilty of fraud and deception in the practice of chiropractic in violation of 460133H, and he has recommended the revocation of Dr. Dappolonia's license.

DR. HENDRICKS: Anyone have any further questions of counsel?

MS. REILLY: Excuse me, I stand corrected. He's also been charged with a violation of

460133M.

MR. HARTLEY: Using unauthorized instruments.

DR. HENDRICKS: Not getting any inquiries, chair then assumes everyone understands the order. And Dr. Vogel, are you ready -- excuse me.

DR. KAPLAN: I was just going to say, is a motion in order?

DR. HENDRICKS: I just asked Dr. Vogel if he'd care to make comments or a motion at this time regarding the order. He would defer to Dr. Kaplan.

DR. KAPLAN: I move that we accept the administrative hearing officer's recommendation on this final order for revocation of Dr. Dappolonia's license.

DR. VOGEL: I second it.

DR. HENDRICKS: Dr. Vogel seconds that motion. I now entertain discussion. Dr. Aiken, do you have discussion?

DR. AIKEN: I don't have any discussion.

DR. HENDRICKS: Dr. Harris, you have any discussion?

DR. HARRIS: I have no discussion.

DR. HENDRICKS: Dr. Kaplan, any discussion?

DR. KAPLAN: I just made the motion.

DR. HENDRICKS: Dr. Vogel, any discussion?

All in favor of the motion to accept the recommended order as received and just read, in favor, aye.

(All board members so respond.)

DR. HENDRICKS: Opposed, same sign. Motion is carried.

MR. HARTLEY: I think you will instruct counsel to prepare final order.

DR. HENDRICKS: In order for the chair to instruct, I understand, counsel to prepare the final order. Chair so instructs.

DR. VOGEL: I want to move to the next item of business.

MS. REILLY: Before we leave the last item on the agenda, I did prepare a final order which adopts the hearing officer's final order and you will find it attached to the materials I passed out previously. If that meets with your approval, that can be signed today.

DR. HENDRICKS: With the chair just so instructed, which is proper, I believe,

to vote.

DR. VOGEL: I move we recess for seven minutes.

DR. HENDRICKS: At 11:27, the chair recesses for seven minutes if there is no opposing votes.

(Whereupon, the proceedings concerning Dr. Dappolonia were concluded.)

* * * * * * *

C E R T I F I C A T E

STATE OF FLORIDA)
COUNTY OF ORANGE)

I, ANGELA WILSON, being a Notary Public and Certified Shorthand Reporter, State of Florida at Large, do hereby certify that I was authorized to and did report in shorthand the above and foregoing proceedings, and that thereafter my shorthand notes were transcribed and reduced to typewriting under my supervision; and that the pages numbered 2 through 35, inclusive, contain a full, true and correct transcription of my shorthand notes taken therein.

Done and signed this ____ day of July, 1976, in the City of Orlando, County of Orange, State of Florida.

My Commission Expires:
February 4, 1978

Notary Public & C.S.R.